CACC 93/2019

[2020] HKCA 974

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 93 of 2019

(on appeal from HCCC NO 195 of 2018)

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###### BETWEEN

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| HKSAR | | | Respondent |
| and | | |  |
| Herry Jane Yusuph | | | Appellant |
|  |

Before: Hon Yeung VP, Macrae VP and Zervos JA in Court

Date of Hearing: 20 May 2020

Date of Judgment: 26 November 2020

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| J U D G M E N T |

Hon Macrae VP (giving the Judgment of the Court):

# *Introduction*

1. The appellant faced a single charge of trafficking in **‍**a **‍**dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous **‍**Drugs Ordinance, Cap 134 (“the DDO”), alleging that on 22 **‍**November 2017, at **‍**Hong Kong International Airport, she unlawfully trafficked in 63.5 ‍grammes of a solid, containing 48.3 grammes of cocaine **‍**narcotic.
2. The appellant pleaded guilty to the charge before a magistrate, as a result of which she was committed to the High Court for sentence. On 5 November 2018, she was duly sentenced by Deputy Judge Lugar **‍**Mawson (“the judge”) to 5 years and 8 months’ imprisonment; the judge having adopted a starting point of 8 years’ imprisonment for the quantity of cocaine concerned, which he enhanced by 6 months for the international element of bringing the dangerous drugs across the border into Hong Kong, before reducing the resulting 8½ years’ imprisonment by one-third for her early plea of guilty.
3. Pursuant to section 56(1) of the DDO the prosecution also applied to forfeit US$1,800.00 in cash, which was found in the appellant’s possession at the time of the offence. The appellant opposed the application and testified in support of her claim, stating that the money was unrelated to drug trafficking and came from a bank loan taken out for the purpose of her business. The judge did not believe her evidence and ordered the money to be forfeited in full.
4. The appellant sought leave to appeal out of time against both **‍**her sentence of imprisonment and the forfeiture order. On 20 **‍**August **‍**2019, the Single Judge[[1]](#footnote-1) granted her both an extension of time in which to file a Notice of Application for leave to appeal and leave to appeal against sentence. He further granted the appellant an appeal aid certificate so that she could be legally represented at the appeal.

# *The facts*

1. The appellant was, at the time of the offence, a 43-year-old Tanzanian national. On 22 **‍**November 2017, she arrived at Hong Kong International Airport on board an Ethiopian Airlines flight from Addis **‍**Ababa in Ethiopia, her journey having originated in Dar Es Salaam in Tanzania. Upon her arrival, she was intercepted by Customs officers and taken to a Customs **‍**clearance room for examination. An ion-scan test was conducted on her body, which tested positive for the presence of cocaine. As a result, the appellant was taken **‍**to North Lantau Hospital, where an X-ray examination identified foreign **‍**objects inside her body. She was ‍then transferred to the custodial ward of Queen **‍**Elizabeth **‍**Hospital, where she subsequently discharged six plastic packets of cocaine, in the quantity particularised in the charge. The estimated value of the dangerous drugs at the time was HK$58,356.50.

# *The application for forfeiture*

1. Insofar as the application for forfeiture was concerned, the prosecution relied **‍**upon the appellant’s conviction for drug trafficking, the admitted Summary **‍**of Facts and her antecedent statement to establish a *prima facie* case that the US$1,800.00 in cash found on her was liable to be forfeited.
2. A hearing was duly held by the judge to determine the question of forfeiture, in which the appellant gave evidence. She testified that she was a businesswoman in Tanzania, selling articles such as shoes, garments and hair pieces. A business licence was produced, which described the appellant’s business as “Beauty” and detailed her tax identification number. The appellant said that she had funded her business through loans from the bank and, on 16 December 2016 and **‍**16 **‍**August 2017 respectively, had applied for two **‍**loans of 5 **‍**million **‍**shillings each (5 million shillings being the equivalent of about US$2,600.00). She claimed that the money from the loans was deposited into her bank account, from which funds she used US$700 to purchase her air **‍**ticket to Hong Kong, and US$100 to provide for her children’s food while she was away.
3. Although she began her journey in Dar Es Salaam, the appellant had stopped over in Addis Ababa for what she claimed was a “get **‍**together” with others who were coming to Hong Kong for a religious seminar[[2]](#footnote-2). It was only when she was in Addis Ababa that she was prevailed upon to bring the drugs in question to Hong Kong.
4. The appellant testified that the US$1,800.00 found on her was to be used to buy 10 dress suits in Hong Kong, for which she had already received orders; while the balance of the money would be used in the Mainland for her regular business. Her passport was adduced in evidence, containing a number of visas for the Mainland, which the appellant said had been previously issued to her for travelling directly from Tanzania to China in connection with her business. The appellant maintained that she had not received any reward for bringing the dangerous drugs into Hong **‍**Kong.
5. In his ruling on forfeiture, the judge held that much of what the appellant had said in her evidence was untrue and an attempt to confuse and mislead the court. He further found[[3]](#footnote-3):

“I am satisfied from the cross-examination, it is quite clear from that, that counsel then representing the defendant found herself, as did the legal aid authorities, in the embarrassing situation of having to apply to this court for discharge of the legal aid certificate. It is quite clear that I have been fed a cock and bull story. I am satisfied on the balance of probabilities that the US$1,800.00 is liable to forfeiture under section 56(1)(a) of the Dangerous Drugs Ordinance.”

# *The appellant’s application to adduce fresh evidence on appeal – affidavit of Father Wotherspoon*

1. For the purposes of her appeal against sentence, the appellant’s solicitors also filed, on 20 December 2019, an affidavit by Father John Wotherspoon, a **‍**prison chaplain, outlining the appellant’s involvement in his anti-drugs ‘campaign’. That involvement, which he described as “substantial”, comprises a 2-page letter written to him by the appellant on 27 **‍**December **‍**2017 and subsequently published on an Internet forum, and other assistance, which has been forwarded by Father Wotherspoon to the relevant authorities in the United States.

# *An overview of the grounds of appeal*

1. The appellant, who is now represented by Mr Walsh SC, with him Mr Lee, has raised two grounds of appeal: the first concerns the quantum of sentence; the second, the order for forfeiture. Ground 1 avers that the judge erred in his calculation of the starting point by adopting one which exceeded the arithmetically calculated starting point, thus resulting in the sentence being manifestly excessive and/or wrong in principle (see **‍section F** *infra*). Ground 2 alleges that the judge erred in making the order for forfeiture by (i) giving inadequate and insufficient reasons for rejecting the appellant’s account; and/or (ii) making an order which was outside the scope of section **‍**56(1) of the DDO (see **section G** *infra*).

# *Ground 1*

## F.1. The appellant’s submissions on Ground 1

### *F.1.1. The appellant’s argument generally*

1. It seems clear that the genesis of this ground of appeal lay in the terms in which the Single Judge granted leave to appeal, having found that the judge’s starting point exceeded a strict application of the relevant sentencing guidelines to the quantity concerned by some 6 weeks. The Single Judge had held[[4]](#footnote-4):

“This raises the question of the effect of recent Court of Appeal authority in drug sentencing cases. In my view it is reasonably arguable that:

(i) the initial starting point is reached by a discretionless arithmetic calculation within the relevant sentencing band;

(ii) once this arithmetic starting point is calculated the sentencing discretion comes into operation;

(iii) the sentencing discretion operates firstly to enhance the starting point by reference to any aggravating factor. This then becomes the court’s final starting point before allowing for any mitigation; and

(iv) this final starting point is then discounted for the mitigating factors which usually will be:

(a) a plea of guilty (maximum of one-third);

(b) assistance to the authorities (which can be up to a full one-third discount on its own and which in conjunction with a plea of guilty can take the normal one-third discount up to a maximum of two-thirds); and

(c) any other mitigation. It is unclear where this mitigation may come into play. Does it operate, where there is a plea of guilty, at step (iii) as a measure to lower the final starting point or does it operate as a separate and new step (v) at the end **‍**of the sentencing process. Such form of mitigation may be a compassionate allowance by the **‍**courts in response to the defendant’s personal circumstances or a discount, as is claimed by this applicant, within the three months’ maximum that the Court of Appeal has allowed for participation in Father Wotherspoon’s campaign.

If this is the way the law has developed then it would seem appropriate for the prosecutor and the defence counsel to agree on the arithmetic calculation and to place that before the sentencing court. The sentencing court can then turn to the prosecutor and ask if they are relying on any aggravating factor to enhance that starting point before turning to defence counsel to hear what is being advanced in mitigation.”

1. Adopting this approach, Mr Walsh submitted that a sentencing court should adopt a three-stage process when determining the starting point in drug trafficking cases. First, the arithmetical starting point should be calculated. Secondly, the court should consider any aggravating factors in order to work out a final starting point. Thirdly, the court should consider any mitigating factors which would go to discount the final starting point. In this regard, Mr Walsh argued that insofar as the defendant’s personal mitigating circumstances were concerned, a reduction should only be given *after* the appropriate discount for plea and, where appropriate, any reduction for assistance to the authorities.
2. In respect of this latter argument, leading counsel illustrated the advantage to a defendant of the sentencing judge applying a discount in respect of other mitigating factors *after* the discount for plea. If the defendant were, for example, to be given a specific discount of 3 months for excessive delay in prosecution, his starting point of 6 **‍**years’ (or **‍**72 **‍**months’) would be reduced to 69 months’ imprisonment. A one‑third discount for plea from that starting point would then take the ultimate sentence to 46 months’ imprisonment. However, if the 3 months’ reduction for delay were given *after* the discount for plea, the ultimate sentence would be 45 months’ imprisonment. This was said to be particularly important in situations where the notional sentence after trial exceeded the jurisdictional limit of the court. In such situations, only if further mitigating factors were to be considered *after* the one-third discount had been applied, could they be meaningfully reflected in the outcome.

### *F.1.2. The appellant’s submissions on a prior agreement as to starting point*

1. Mr Walsh contended that a necessary first step in the sentencing process would be for the prosecution and defence to come to an agreement as to what the starting point should be by way of arithmetical calculation. This would minimise the risk of the sentencing court adopting an incorrect arithmetical starting point. It would also reduce the number of complaints by litigants acting in person, who perceived a miscarriage of justice had been done to them if another defendant had received a lighter sentence for trafficking in the same, or even a larger, quantity of dangerous drugs.
2. Leading counsel referred to *Chan Chi-ming v R*[[5]](#footnote-5), where from the outset of its judgment the **‍**Court had emphasised the need for consistency in the development of sentencing guidelines[[6]](#footnote-6):

“It may perhaps be objected that in attempting to prescribe a tariff for this offence, we are interfering improperly with the discretion of courts of trial. We do not think so, for the following reasons:-

…

c) Fairness to convicted persons requires a substantial degree of consistency in the punishment to be imposed for similar offences;

d) While there never can be perfect consistency, since the facts of each case and the record, character and circumstances of convicted persons differ, justice requires that there should not be wide variations in punishment because of individual views of judges or magistrates”.

1. Mr Walsh argued that, unless a strict arithmetical approach is adopted, starting points for offences of drug trafficking in similar quantities will vary. He produced a table of 90 cases[[7]](#footnote-7) heard over the past 10 years, involving defendants who have trafficked in quantities of between 40 and 60 **‍**grammes of cocaine (or heroin) narcotic, which revealed that there were 54 cases in which the defendant had obtained a lower starting point than a strict arithmetical application of guideline to quantity would have produced; while in 14 cases, the defendant had received a slightly higher starting point. In 22 cases, the arithmetical starting point indicated under the guidelines was the starting point adopted by the sentencing judge.

### *F.1.3. The appellant’s submissions on the role of the defendant*

1. Although Mr Walsh’s written submissions appeared to challenge the validity of the sentencing guidelines for heroin in *R v Lau* ***‍****Tak-ming & Anor*[[8]](#footnote-8), and their extension to cocaine in *Attorney General v Pedro Nel Rojas*[[9]](#footnote-9), as being out of date and out of step with sentencing practice in other common law jurisdictions, he drew back from that position in oral argument, arguing instead that sentencing practice in Hong **‍**Kong did not sufficiently acknowledge the role of individual offenders when identifying the starting point. In particular, the present sentencing regime did not enable **‍**the courts to distinguish sufficiently between the different roles of different offenders.
2. In making this submission, Mr Walsh seized in particular on the *obiter* remarks of McWalters JA, in his separate judgment in *HKSAR v* *Kilima Abubakar Abbas (“Kilima”)*[[10]](#footnote-10):

“I agree with Lunn VP’s analysis of the law and with his conclusion. At [45] of his judgment Lunn VP refers to the effect of *HKSAR v Abdallah*[[11]](#footnote-11) in narrowing the room for reflecting the difference in role between a mere courier and those involved in a more major way in the organisation of the drug trafficking activity. This is a matter for concern. The sentencing regime must allow for the possibility that there will be large seizures of dangerous drugs and also for the possibility that persons, other than couriers, who are more heavily involved in this criminal activity, will be prosecuted. When these possibilities coincide, I fear that courts may find that the sentencing range available to them to reflect these aggravating factors may not enable them to adequately distinguish the culpability of the courier from that of the organiser.” (Citation added)

1. McWalters JA had then gone on in *Kilima* to express particular concern with the statement of Stuart-Moore ACJHC, in his separate judgment in *HKSAR v Manalo*[[12]](#footnote-12)(also cited in the Hong Kong Cases reports as *HKSAR v Burnales*[[13]](#footnote-13)),in respect of consistency of sentence, where Stuart-Moore ACJHC had said[[14]](#footnote-14):

“The policy of this Court in relation to trafficking in drugs of these kinds has been to maintain a *consistent* level of sentencing under the guideline cases earlier mentioned so that potential traffickers who are frequently couriers or storekeepers, will be deterred from engaging in such activities. Consistency, in this context, is related to sentences which are largely based upon the *weight* of the drugs being trafficked. If this Court were to decide otherwise, the courts at first instance would find themselves endlessly being asked to consider the **‍**degree of culpability related to individual couriers and **‍**storekeepers. The guidelines, whilst of course not strait‑jackets, are there to provide and maintain consistency of sentence between all offenders who traffick in dangerous drugs. *It is important for the courts to avoid distinctions, which will often be irrational or speculative, being drawn between drug traffickers who are couriers or storekeepers because the resulting disparity in the levels of sentence will understandably lead to feelings of grievance*.” (Emphasis supplied)

1. Of the remarks in the italicised part of this passage, McWalters JA said[[15]](#footnote-15):

“In my view the observations by Stuart-Moore ACJHC in *HKSAR v Manalo* are not a proper legal rationale for not **‍**distinguishing between the culpability of offenders. Sentencing courts are daily being called upon to assess the culpability of offenders. In doing so they listen to submissions advanced on behalf of a defendant and have to form a view of the merit of those submissions. This is usually not an onerous **‍**task. It may become complicated by the need for a *Newton* **‍**enquiry but again that has become a regular feature of our sentencing process. I have complete confidence in the ability of our judicial officers to recognise irrational or speculative submissions being advanced on behalf of a defendant.

Nor do I think the aggrieved feelings of offenders is a reason for not allowing judges to accept a legitimate distinction in culpability and to sentence an offender accordingly, even if that means departing from the tariffs and imposing an individualised sentence. Offenders will always feel a sense of grievance with their sentences for the very simple reason that every offender wants a lower sentence.

Drug traffickers regularly argue in the Court of Appeal that, compared with other offenders their sentence is too high. But they also point to personal circumstances that distinguish them from others. On the one hand they want consistent sentences in the sense that they do not want to be punished more severely than others, and on the other hand they want individualised sentencing so that their sentences are less severe than others.

The courts, especially the appellate courts, are not concerned with whether an offender has a grievance with his sentence but whether he has a *justifiable* grievance.”

1. Mr Walsh submitted that Hong Kong should follow approaches adopted in other jurisdictions insofar as they take into account the role of the offender, and that this should be done in addition to taking a strict arithmetical approach. He referred to the salutary reminder of the High Court of Australia in *Wong v The Queen*[[16]](#footnote-16)that an arithmetical approach to sentencing, whilst simple to apply, can be wrong in principle where the individual circumstances, including the role of the defendant, are considered less significant than the quantity of the drugs concerned. The Court in *Wong* was critical of the use of the weight of the narcotic being used as the **‍**primary factor in determining sentence. In their joint judgment, **‍**Gaudron, Gummow and Hayne JJ said of the arithmetical approach to sentencing, with its increments or decrements from a predetermined range of sentences, that it was apt to give rise to error, as well as be a departure from principle[[17]](#footnote-17):

“It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say ‘may be’ quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’[[18]](#footnote-18). This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.” (Citation added)

### *F.1.4. The appellant’s submissions on the alleged assistance to Father* ***‍****Wotherspoon’s ‘campaign’*

1. The appellant further sought leave to rely on the contents of an affidavit filed by Father John Wotherspoon to support the contention that her sentence should be reduced because of her participation in his ‘**‍**campaign’. This information was not provided to the judge during mitigation but Mr Walsh nevertheless sought to introduce this evidence on the basis that it was in the interests of justice for the Court to receive it, since it would fall to this Court to re‑sentence the appellant if it considered that Ground 1 was made out. The affidavit, which we received on a *de ‍bene esse* basis, details two types of assistance the appellant is said to have provided; namely, a 2-page letter published on an Internet forum, and post-***‍***sentence assistance in the form of information provided to Father ***‍***Wotherspoon, which he had passed on to United States authorities.

## F.2. The respondent’s submissions on Ground 1

### *F.2.1. The respondent’s argument generally*

1. It is the firm position of Mr Lui, on behalf of the respondent, that the sentencing regime in respect of drug trafficking in Hong Kong has been devised, refined and successfully operated and understood over several decades in this jurisdiction, and there is no need to change it. In this respect, he cited the observations of Macrae VP, in his judgment in *Kilima*, that[[19]](#footnote-19):

“The one thing that has struck me, having had to consider in the past few months the trends and statistics for the seizures, arrests and convictions in respect of a wide spectrum of dangerous drugs in Hong Kong since January 2015[[20]](#footnote-20), is that rather than being swamped by a problem which is out of control, as other countries seem to have been, the problem in Hong Kong is being steadily contained, if not, in certain respects, reduced. And since in this jurisdiction we do not have the death penalty for drug trafficking, unlike almost all of our neighbours, that position is in no small measure due to our own particular policy of law enforcement, backed up by harsh, but consistent, sentencing for drug trafficking.”

1. Insofar as the alleged rigidity or arbitrariness of such a sentencing **‍**approach is concerned, the respondent referred to the recent, comprehensive answer to that complaint given by Zervos JA, on behalf of a Court which also comprised Macrae VP and McWalters JA, in *HKSAR v Godson* ***‍****Ugochukwu Okoro*[[21]](#footnote-21):

“94. The suggestion that the sentencing guidelines are fixed and compulsory is not correct. A sentencing court can depart from the sentencing guidelines when the circumstances warrant it. As one would expect, this can only be done when, as a matter of sentencing policy or principle, it is appropriate to do so. This Court has explained that the sentencing guidelines are not a ‘straitjacket’ and can be departed from when there is ‘a **‍**good reason’ for doing so. A sentencing court will, applying the sentencing guidelines, determine an appropriate starting point, taking into account the facts and circumstances of the case, subject to increase for any aggravating factors or reduction for any mitigating factors.

……

97. In summary, this Court has reconfirmed in *Kilima* that the sentencing guidelines of *Lau Tak Ming* and *Abdallah* apply to drug couriers. They provide important principles and guidance to sentencing courts, which still retain the flexibility to depart from them when there is good reason to do so, and impose an appropriate sentence in the circumstances of the offence and the offender. They are not arbitrary and do not violate BOR **‍**5(1) or BL 28.”

1. Mr Lui made the point that the appellant had provided no empirical data or legal argument to justify the contention that developments in sentencing law and practice in other common law jurisdictions, in particular, concerning an offender’s role and level of culpability, should be followed in Hong Kong. Pointing out that the only “new” development advanced by the appellant was the decision of the New **‍**Zealand Court of Appeal in *Zhang & Ors v The Queen*[[22]](#footnote-22), Mr Lui submitted that the authority was distinguishable, not merely because the New Zealand guidelines were based on a very different statutory framework, namely the Sentencing Act 2002, which sets out the purpose and principles of sentencing in New Zealand courts; but also because it came about as a result of identifiable criticisms of the previous guidelines in *R* ***‍****v* ***‍****Fatu*[[23]](#footnote-23), none of which criticisms may be made of the guidelines in Hong Kong. Furthermore, Mr Lui cautioned that the new guidelines in *Zhang* were only handed down in late October 2019; accordingly, their effectiveness is not yet known, nor has the appellant explained why the *Zhang* guidelines would better suit the needs of Hong Kong society.
2. So far as the alleged inadequacy of the current sentencing regime in Hong Kong to cater for the individual needs and circumstances of the defendant is concerned, the **‍**respondent referred to the Court’s resolution of this complaint in *Godson* ***‍****Ugochukwu Okoro*[[24]](#footnote-24):

“This proposition is largely based on the premise that the sentencing guidelines cannot take into account the role of **‍**an **‍**offender, such as that of a courier, and therefore sentences **‍**imposed on couriers under the sentencing guidelines **‍**are **‍**manifestly disproportionate to the criminality involved. However, as already noted, the sentencing guidelines were specifically formulated to address the range of sentences that should be imposed on a courier or a storekeeper. It, therefore, cannot be argued that it is arbitrary because of this factor. The complaint is really not one of arbitrariness, but of the application of the sentencing guidelines to couriers, but that has been confirmed to be the case in *Kilima*. The fact that a defendant may have played a more significant role in the trafficking of drugs would and should be visited with an upward adjustment of the sentencing guidelines.”

### *F.2.2. The respondent’s submissions as to a discretionless, arithmetic calculation*

1. While Mr Lui took issue with the term *discretionless*, if by that term the suggestion is that the judge has no discretion at all in calculating **‍**the **‍**starting point, he was nevertheless in broad agreement with the **‍**three‑step **‍**approach to sentencing in drug trafficking offences, which **‍**accords **‍**with **‍**established sentencing principles. In *HKSAR v Nwadiuto* ***‍****Samuel* ***‍****Joseph*[[25]](#footnote-25), the Court explained the matter in this way[[26]](#footnote-26):

“Transparency in the sentencing process flows from the court demonstrating to the offender how the sentence is calculated. This is essentially a three stage process composed of adopting a starting point, identifying the presence of any aggravating factors and then enhancing the starting point to allow for them and finally discounting that initial sentence, which would be the sentence after trial, to allow for the offender’s mitigation. In most cases the only mitigation will be the offender’s plea of guilty which attracts a one-third discount. This Court has reiterated on many occasions that most of the matters that are raised in mitigation will be subsumed in this one-third discount. This includes remorse and sympathetic personal circumstances of the offender which led him to commit the offence. It requires something exceptional, such as assistance to the authorities, to take the discount beyond the normal one-third.”

1. The authorities are replete with affirmations of the importance of consistency in sentencing for trafficking in dangerous drugs, beginning with *Chan Chi-ming*, decided more than 40 years ago. More recently, in *HKSAR v* *Conde Nassou*[[27]](#footnote-27), the Court reaffirmed and explained this important principle[[28]](#footnote-28):

“It must be remembered that the reason for having these sentencing tariffs is to promote consistency of sentencing. The goal of consistency is pursued because of the benefits it brings to the whole of the administration of criminal justice. They include:

(i) it enables there to be transparency in the sentencing process so that all those affected can readily understand how a particular sentence was arrived at;

(ii) it results in a fairer sentencing process with a lower likelihood of the offender being aggrieved by either the sentencing process or its outcome;

(iii) it makes less likely judicial error and contributes to a reduction in sentencing appeals; and

(iv) by making the likely punishment for the offence more publicly known it contributes to the deterrent character of the sentence.”

1. The Court in *Conde Nassou* went on[[29]](#footnote-29):

“The more courts depart from sentencing on the basis of the weight of the drug, the less consistency will be achieved. In the context of such a regime mathematics clearly plays a role in guiding the court to where within the relevant sentencing band it adopts an initial starting point for sentence.

Because drug trafficking cases, especially those involving international couriers, can have great factual similarity there may be nothing in either the circumstances of the commission of the offence or the background of the offender which calls for the judge to depart from a mathematically determined starting point.

However, where matters are brought to the attention of the judge which engage the exercise of his discretion then he will depart from what the mathematics might otherwise suggest is the appropriate starting point within the relevant sentencing band.

But where the discretion is engaged the judge must explain why he has departed from the mathematical starting point, especially where he intends adopting a starting point within the band that is significantly higher than that which mathematics suggests is appropriate.”

1. In reliance on these statements from *Nwadiuto Samuel Joseph* and *Conde* ***‍****Nassou*, Mr Lui submitted that in reality, within this branch of criminal sentencing, there is likely to be little mitigation beyond the plea which can affect the sentence, unless it is some form of post-arrest assistance. As **‍**Stock VP explained in *HKSAR v An unknown person alias Stojanovic* ***‍****Milka and Skopljak Sara*[[30]](#footnote-30)(which, for convenience, we shall call *Stojanovic Milka*):

“It is true that in this category of offence, sentence is very largely based on quantity and whilst it is normally of limited avail in other categories of offence for applicants to point in respect of like offences to sentences by different courts, there is a particular need for consistency in a category of offence *when individual mitigation tends, for policy reasons, to count for little*, the point made by this court in *HKSAR v Leung Wai Man*[[31]](#footnote-31)…” (Emphasis **‍**supplied)

1. The reference to individual mitigation counting for little in this branch of criminal sentencing echoes a similar sentiment of the Court made 30 years ago in *Lau Tak-ming & Anor*[[32]](#footnote-32):

“It must be borne in mind that these are offences of the utmost gravity, which may well result in mitigating factors which, for less serious offences could lead to a discount, having little weight.”

1. Mr Lui acknowledged that while the courts strive for consistency, there can never be perfect consistency. He cited the judgment of the Court in *HKSAR v Rawe Waikama Magarya*[[33]](#footnote-33) in support of the proposition that:

“The purpose of the Court of Appeal’s guidelines are to produce consistency in the approach to sentence; not to produce identical sentences. They are not intended to deprive a judge of his sentencing discretion even though they may, through the creation of weight of narcotic-based tariff sentencing ranges, impose constraints on the operation of that discretion. There always remains some room for the exercise of individual judicial officers of their sentencing discretion.”

1. He emphasised that since there can never be perfect consistency, a departure from a strict arithmetical starting point should not for that reason alone be appealable. However, he accepted that where the departure was significant, the judge should explain why. An appellate court could certainly examine the reasons given for such a departure where it was significant, but it should not tinker with sentences.

### *F.2.3. The respondent’s submissions as to whether there should be an agreed starting point*

1. Mr Lui contended that it would not be viable or appropriate for the prosecution and the defence to agree upon an exact, basic starting point to be determined by a discretionless arithmetical calculation, for the simple reason that the starting point is not discretionless. Moreover, such an agreement would become extremely difficult where there was more than one charge or count, and impossible where there was a “cocktail” of drugs in any charge or count. For, in the latter situation, the court is required as an exercise of discretion to adjust the starting point for the more serious drug upward by virtue of the other less serious drugs, which discretionary exercise cannot be dictated by the agreement of counsel.

### *F.2.4. The respondent’s submissions as to the proposed fresh evidence*

1. Mr Lui submitted that there is nothing to suggest the information provided by the appellant was of any practical use to the authorities, either here in Hong Kong or overseas. Moreover, it is significant that the appellant only came to supply the information more than 16 months after her arrest in November 2017. Accordingly, he argued that any change of circumstances which might now render the information useful could be submitted to, and dealt with by, the Executive. Moreover, there was ample authority for the Court to refuse any reduction in sentence where the **‍**applicant’s participation in **‍**Father **‍**Wotherspoon’s ‘campaign’ was **‍**limited: **‍**see, for example, the recent decisions of this Court in *HKSAR* ***‍****v* ***‍****Kisamo* ***‍****Diana* ***‍****Semali*;[[34]](#footnote-34) *HKSAR v Fundi Furaha Giles*[[35]](#footnote-35); and **‍***HKSAR v Camara Aboubacar*[[36]](#footnote-36).

### *F.2.5. The respondent’s submissions as to the sentence passed on the appellant*

1. Acknowledging that where a judge has departed from the strict application of the guidelines in a significant way, whether by an increase or a decrease of the arithmetical starting point, he or she should explain why, Mr Lui submitted that a mere 6 weeks’ difference from a starting point arrived at arithmetically did not warrant interference by this Court. He referred to the decision in *HKSAR v* *Zaripov* ***‍****Eduard*[[37]](#footnote-37), in which the Court had refused to interfere with a sentence where the starting point adopted was just over 2 months above the arithmetical starting point; albeit that the starting point for the quantity of narcotic concerned in that case was 20 years’ imprisonment[[38]](#footnote-38).

## F.3. Discussion

### *F.3.1. The sentencing guidelines*

1. It should be remembered that sentencing guidelines are exactly that: they are lines to guide a judge in sentencing. They are not fixed, compulsory or arbitrary straitjackets, nor should they be slavishly applied. The word “tariff” is sometimes used loosely to refer to sentencing guidelines but it is perhaps a misnomer in this context, because a tariff in its more technical sense is a fixed customs duty levied according to an official schedule or table of charges. However, unlike tariffs, guidelines cater for a discretionary element. As Lord Woolf CJ explained in *R v Milberry*[[39]](#footnote-39), albeit in the context of sentencing guidelines in England and Wales for rape[[40]](#footnote-40):

“Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.”

1. In *Wong*, Gleeson CJ (as Gleeson NPJ then was) put the matter in this way[[41]](#footnote-41):

“The expressions “guidelines” and “guidelines judgments” have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account of given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of outcome, other than in exceptional circumstances.”

He went on to accept that “[a]ll discretionary decision-making carries with it the probability of some degree of inconsistency”: however, one of the legitimate objectives of having guidelines is “to reduce the incidence of unnecessary and inappropriate inconsistency”. The administration of criminal justice “should be systematically fair, and that involves, amongst other things, reasonable consistency”[[42]](#footnote-42). In our judgment, the goal of sentencing guidelines must be to achieve reasonable consistency in general, and justice in a specific, individual case.

### *F.3.2. Two particular facets of sentencing in trafficking cases*

1. In respect of the offence of trafficking in dangerous drugs, two particular facets of sentencing need to be noted. First, in this realm of criminal sentencing, there is often little to differentiate between the facts of different cases, save for the quantity of drug involved and, where it can be established, the role played by a defendant. However, the true role and purpose of a defendant arrested for trafficking in dangerous drugs is not often easy to discern with any great certainty. When a defendant is stopped in the street and found to be in possession of dangerous drugs, it can be unclear whether he is taking the drugs home to store them, whether **‍**he is delivering them to a customer on behalf of a dealer or acting **‍**as a **‍**go‑between for two dealers, or whether he is actually dealing **‍**in **‍**them **‍**himself on the street. In his judgment in *Kilima*, Macrae **‍**VP **‍**voiced **‍**certain misgivings about the **‍**application of the *Drug* ***‍****Offences* ***‍****Definitive* ***‍****Guideline* of the United **‍**Kingdom to sentencing in drugs cases in this jurisdiction, because[[43]](#footnote-43):

“Absent clear admissions or, perhaps, accomplice evidence, a defendant’s precise role or place in the hierarchy of a drug trafficking organisation is always more difficult to establish”.

He went on[[44]](#footnote-44):

“In reality, in most cases it is very difficult to know how closely a defendant is linked with the original source of the drugs[[45]](#footnote-45), what his awareness and understanding of the scale of the operation might be[[46]](#footnote-46) or how limited his function really is[[47]](#footnote-47); questions which become even more difficult to answer with a foreign defendant who has travelled across the world on an elaborate itinerary from one country or continent to another before entering Hong Kong with cocaine secreted within his body worth hundreds of thousands, if not millions, of dollars. That is perhaps why we set the bar at the level of the courier, raising it if there is an international element and when the scale of the applicant’s role becomes clear.”

1. And, as McWalters JA has pointed out in *Conde Nassou*[[48]](#footnote-48):

“Because drug trafficking cases, especially those involving international couriers, can have great factual similarity there may be nothing in either the circumstances of the commission of the offence or the background of the offender which calls for the judge to depart from a mathematically determined starting point.”

1. It is, we think, because of the difficulty sometimes of proving the exact role and purpose of the defendant who is found in possession of dangerous drugs, coupled with the reality that there is little to distinguish between the essential facts of different cases, except for the quantity involved, that sentencing policy in this jurisdiction proceeds on the basis that the defendant is a courier or storekeeper unless it can be demonstrated otherwise. However, where a greater (or lesser) role or purpose can be demonstrated on the facts of a particular case, then the starting point for sentence can be appropriately increased (or decreased).
2. Secondly, the offence of trafficking in dangerous drugs is an extremely serious crime in this jurisdiction, where the offence carries a maximum sentence of life imprisonment and a fine of HK$5 million; indeed, in many neighbouring jurisdictions in this region of the world, the offence carries the death penalty[[49]](#footnote-49). Given the appalling consequences which the proliferation of dangerous, particularly addictive, drugs has on families, communities, the workplace, indeed, on the whole fabric and functioning of society, the reasons for a defendant’s involvement in the crime and his personal circumstances are of far less importance than society’s duty to protect its citizens and the courts’ paramount function of “denunciation, deterrence and punishment”[[50]](#footnote-50) of those who would seek to traffick in dangerous drugs. As the Court said in *Lau Tak-ming & Anor* in 1990, mitigating factors in cases of this nature will have less weight than they might otherwise have for less serious offences[[51]](#footnote-51); a point emphasised again two decades later in *Stojanovic Milka[[52]](#footnote-52)*, and reiterated in *Kilima*[[53]](#footnote-53).
3. It is because of these two particular facets of sentencing for offences of this nature that consistency in sentencing in trafficking cases becomes so important. For, if one cannot readily distinguish between different cases of trafficking except as to the quantity of the drug being trafficked, and if personal mitigation has little weight in sentencing for such a crime, then consistency in sentence becomes all the more imperative. Where, for example, there is nothing otherwise to distinguish between two **‍**couriers, **‍**one, an impoverished defendant arriving at Hong Kong International **‍**Airport from South **‍**America carrying a kilogramme of cocaine secreted within his body, the other, an indebted defendant arriving from Africa with a kilogramme of cocaine hidden inside his suitcase, it is important that they should be dealt with in a similar way so far as determining the starting point for their respective offences. As the Court in *HKSAR v Leung Wai Man*[[54]](#footnote-54) put it:

“The final consideration we wish to mention is that of consistency in sentence. Underpinning our system of criminal sentences is a recognition that like offences should attract like sentences. Unjustified disparity in sentencing undermines confidence in the justice system, and it is important that there be consistency in the category of offence where individual mitigation tends, for policy reasons, to count for little.”

1. Nevertheless, the court must still retain an important element of discretion in sentencing for such offences and, as we have said, consistent sentencing does not mean identical sentencing. There will **‍**often be differences, however slight, between defendants (and **‍**co-**‍**defendants) and the roles they play in different cases, which may **‍**be **‍**reflected in different **‍**sentences by different judges. In *Nwadiuto* ***‍****Samuel* ***‍****Joseph*[[55]](#footnote-55), McWalters **‍**JA explained:

“The drug trafficking sentencing guidelines seek to achieve both transparency in the sentencing process and consistency in the sentencing outcome. Although arithmetic plays a role in achieving both these goals it is not intended that it should usurp the function of the judge or eliminate the exercise of discretion by him in the determination of what is a just and fair sentence.”

See also his earlier comments in *Rawe Waikama Magarya*, to which we have already referred[[56]](#footnote-56).

1. Similarly, in *HKSAR v Tsang Ka Man*[[57]](#footnote-57), Yeung VP held[[58]](#footnote-58):

“In ‘drug trafficking’ cases, in order to ensure consistency in sentencing and sufficient deterrent effect and prevent offenders from trying their luck, the Court of Appeal has laid down fundamental sentencing guidelines according to the nature and quantity of the dangerous drugs.”

Nevertheless, he cautioned[[59]](#footnote-59):

“The guidelines laid down by the Court of Appeal according to the types and quantity of dangerous drugs, however, are not a straitjacket.”

1. In the same vein, in *Stojanovic Milka*, whilst acknowledging the need for consistency of sentence, Stock VP (as Stock NPJ then was) sounded a warning about the indiscriminate comparison that is often made between sentences by different courts for like offences[[60]](#footnote-60):

“… there is a limit to which this can be taken, for there is a danger of the exercise of comparison getting out of hand with a view to such fine tuning as to denude sentencing discretion of any meaning at all. Some differences between different courts are bound to occur if sentencing is not to be an entirely mathematical exercise.”

### *F.3.3. Couriers and storekeepers*

1. It is here that we should make an important point that simply because the guidelines in various drug trafficking cases are devised for those at the bottom of the trafficking hierarchy, namely, couriers and storekeepers, it does not mean that once one of those labels can be applied to the actions of a defendant, there is no discretion to go above or below the arithmetically determined starting point. During argument, we contrasted the examples of the mother of a drug addict who permits her son to store 50 **‍**grammes of Ice in her home, knowing that he is trafficking in those drugs, partly to satisfy his own habit, with the home owner or tenant who permits another to store the same quantity of drugs in his home for the purposes of trafficking for a fee of $2,000 per month, and posed the question, who is the more culpable? We could ask the same question of the courier who, on a single occasion, is asked to take a parcel of 50 **‍**grammes of Ice from one part of Hong Kong to another without fee for her boyfriend and the defendant who, on the instructions of a dealer, delivers 10 packets of 5 grammes of Ice each to different customers in different parts of Hong Kong during the course of a day for a fee of $2,000. And, if we were to compare the mother in the first example with the distributor of drugs in the last example, the distinction becomes even more obvious. Yet they all fall within the label of ‘courier’ or ‘storekeeper’.
2. Labels can be easily applied, but they can sometimes be inapposite in conveying the real role of the defendant in question. In *R* ***‍****v* ***‍****Yavuz*[[61]](#footnote-61), the Supreme Court of South Australia cautioned judges sentencing in drug trafficking cases to exercise care when applying labels such as ‘courier’, ‘street level dealer’ and ‘principal’, so that “they do not mask a true assessment of the individual’s culpability”[[62]](#footnote-62). It is important that however the judge characterises the trafficker concerned, it should ultimately be assessed on an individualised basis.

### *F.3.4. The correctness of HKSAR v Manalo*

1. The point about the examples we have given, and the danger of labels, is that not all couriers and storekeepers may be as culpable as each other, even though they are trafficking in the same quantity of dangerous drugs. Thus put, there is, we think, a problem with the judgment of Stuart‑Moore **‍**ACJHC in *Manalo*, which we feel we must address. In that case, Keith JA, sitting as a Single Judge of the Court of Appeal, had granted leave to appeal against sentence because it appeared that the trial judge had decided on a starting point of 9 years’ imprisonment by a “mathematical and mechanical application of the tariff”, in which he had taken into account only the amount of Ice concerned and not the degree of involvement in the drugs trade of the appellant, whom Keith JA described as “*simply a courier* taking Ice from one point of the chain of distribution to another”[[63]](#footnote-63) (Original emphasis).
2. Stuart-Moore ACJHC took issue with this determination, “if **‍**what was being implied by Keith JA was the suggestion that a ‘simple **‍**courier’ is deserving of less than a tariff sentence under the guidelines”[[64]](#footnote-64). Holding that the Court in *Lau Tak-ming & Anor* had no intention of treating couriers or storekeepers of heroin as if they were deserving of more lenient treatment than the guideline tariffs generally suggest, he went on to make the statement to which we have earlier referred in para 21 *supra*. In effect, he deprecated the notion of the courts “being asked to consider the degree of culpability related to individual couriers and storekeepers”. Had Stuart-Moore ACJHC confined himself to the point that the guidelines were intended for couriers and storekeepers, we would not have disagreed: however, he appears to have gone rather further and held that once the label of ‘courier’ or ‘storekeeper’ can be applied to a defendant, then his precise role in that regard is irrelevant and the courts should avoid being drawn into making nice distinctions between different types of courier or storekeeper.
3. With respect, we cannot accept this latter proposition which, to our mind, runs counter to what the Court in *Lau Tak-ming & Anor* originally said about sentencing judges having regard to “the degree of involvement of the offender”[[65]](#footnote-65). Moreover, it is to be noted that the principal judgment of the Court in *Manalo*, which was given by Leong JA (as Leong CJHC then was), was in fact expressly endorsed by both of the other two judges in the appeal, including Stuart‑Moore ACJHC himself. Yet, Leong JA had correctly stated the principle in his judgment, that “the role played by an offender is *always* part of the circumstances for a sentencing judge to consider”[[66]](#footnote-66); however, on the particular facts of the case (from **‍**which our third example above[[67]](#footnote-67) is in fact derived), he went on to find that the appellant was no mere courier but “his partner in the trade of trafficking in dangerous drugs”[[68]](#footnote-68).
4. In our view, the judgment of Stuart-Moore ACJHC in *Manalo* on this matter cannot be right and, quite apart from it being *obiter*, since the principal judgment of the Court was given by Leong JA, with whom the other two judges agreed, it must now be considered to have been made *per incuriam*. The Single Judge, at the leave application, had raised a perfectly valid point for consideration on appeal, and it was resolved entirely properly at the appeal in the judgment of Leong **‍**JA, which must now be regarded as the judgment of the Court.
5. Moreover, it seems to us that if the courts were “to **‍**avoid **‍**distinctions” when sentencing couriers and storekeepers, as Stuart‑Moore **‍**ACJHC advocated, then the guidelines would, indeed, become discretionless exercises, for the same arithmetical starting point would be applied to all couriers and storekeepers regardless of their individual roles and culpability. For the reasons we have discussed, we cannot accept that this was ever the intention of the Court in *Lau Tak-ming & Anor*, and it runs counter to countless expressions of judicial opinion since.
6. There has been a considerable body of case-law generated on sentencing in dangerous drug cases in this jurisdiction over the past 30 **‍**years since *Lau Tak-ming & Anor* was decided and, although most of it is consistent with the notion that a defendant’s role *always* has a part to play in assessing the notional sentence after trial, there is a strain of more recent authority which has applied the judgment of Stuart-Moore ACJHC in *Manalo* in strict and unyielding terms, and which is not consistent with this approach. It may be helpful, therefore, if we remind judges of the approach to sentencing in cases of trafficking in dangerous drugs to which sentencing guidelines apply. We stress we are concerned only with cases of trafficking in dangerous drugs to which sentencing guidelines apply because other guidelines in respect of other offences, such as rape and robbery, do not have a known but variable element, namely the quantity of a particular dangerous drug, nor are the two distinct facets of sentencing, which we have earlier discussed[[69]](#footnote-69), as prominent.

### *F.3.5. An assessment of the gravity of the offence*

#### *F.3.5.1. The relevant guidelines*

1. When we speak of the gravity of the offence in cases of trafficking in dangerous drugs, we are focussing on the harm caused or created by the offence, which is principally gauged by the type and quantity of the particular drug concerned. Accordingly, the first step when approaching sentence for an offence of trafficking in dangerous drugs is for the judge to identify the relevant guideline band (or bracket) applicable to the quantity of drug concerned. Thus, for 48.3 grammes of heroin or cocaine narcotic (as in this case), the relevant guideline band under *Lau* ***‍****Tak-ming & Anor* would be between 5 and 8 **‍**years’ imprisonment. Had the same quantity been methamphetamine hydrochloride (commonly known as “Ice”), the relevant guideline band under *HKSAR v Tam* ***‍****Yi* ***‍****Chun*[[70]](#footnote-70) would have been between 7 and 11 years’ imprisonment. Had the quantity been ketamine or ecstasy, the relevant guideline band under *Secretary for Justice v Hii Siew Cheng*[[71]](#footnote-71) would have been between 4 and 6 years’ imprisonment.

### *F.3.6. An assessment of role and culpability*

58. The next, or second, step in the process of determining the appropriate sentence in a case of trafficking in dangerous drugs is an assessment by the judge of the role and culpability of the defendant based upon the evidence before the court. The authorities have identified the more common classifications of trafficker which come before the courts.

#### *F.3.6.1. The courier or storekeeper*

1. The guidelines for trafficking in dangerous drugs are based upon thecourier or storekeeper[[72]](#footnote-72); that is the person who is delivering, distributing or conveying the drugs in question for a dealer; or storing the consignment of drugs on behalf of himself or someone else. However, it is important that the term ‘courier’ should not be stretched, simply because it is recognised to be the lowest rank in the trafficking hierarchy upon which the guidelines are based, to embrace the defendant whose actions do not come within this term, in the sense in which it is meant by the authorities. In the recent case of *HKSAR v SK Wasim*[[73]](#footnote-73), for example, the appellant was simply asked to move 15 cartons of cannabis resin from the corridor into a unit on the 7th floor of Chungking Mansions, Tsim Sha Tsui for HK$200. He was arrested after moving 5 cartons. Although he knew he was moving cartons of cannabis resin, he was not, in our judgment, a ‘courier’ in the proper sense in which that term is intended in the authorities.
2. Even where the term ‘courier’ would embrace a defendant’s conduct, it is not without its difficulty of definition because it cannot often be said with certainty why a person arrested in possession of a sizeable quantity of dangerous drugs has them in his possession. It may be that he has just collected them for some unexplained purpose, or he is delivering them somewhere to someone, but it could also be that he is actually dealing in those dangerous drugs himself to others. Absent an admission, or direct or circumstantial evidence, establishing that he is himself dealing with dangerous drugs to others, the courts have generally treated him as a courier or storekeeper, to which the guidelines apply arithmetically. Subject to our observation that the role and culpability of couriers and storekeepers may differ, and that occasionally a defendant’s actions may fall short of acting as either in its intended sense, we would not wish to disturb this approach.

#### *F.3.6.2. The actual (or direct) trafficker*

1. However, the defendant who can be shown by admission, or by direct or circumstantial evidence, to be dealing in dangerous drugs to others, sometimes referred to as *actual* (or *direct*) trafficking, is not a courier or storekeeper, and is in a more serious position. This point was made by this Court as long ago as 1984 in *R v Yeung Ying-kan & Anor*[[74]](#footnote-74), where Silke JA (who, as Silke VP, was later to give the judgment of the Court in *Lau Tak-ming & Anor*) illustrated the distinction:

“Mr Nguyen had sought comfort from various expressions used in the judgment in *Chan Chi-ming*[[75]](#footnote-75). There was reference to: “Trafficking in dangerous drugs, and possession for this purpose, are offences of the upmost gravity” and there was a further reference to the general level of sentences which should be imposed for the offence of “unlawful trafficking” in dangerous drugs. In the light of these references he seeks to persuade us that the tariffs in *Chan Chi-ming* have application not only to the offence of possession of dangerous drugs for the purpose of unlawful trafficking but also to direct trafficking and, further, that we should here consider the quantity of drugs found as being the criterion upon which sentence should be based. This would be the “very small” category for which *Chan Chi-ming* suggested a tariff of two to three years.

We are not so persuaded. The charge of possession for the purpose of unlawful trafficking frequently arises where the quantity falls into that category which raises the presumption in the Dangerous Drugs Ordinance and covers the storekeeper, the courier and the conveyor of these substances. It is this offence alone with which *Chan Chi-ming* was concerned. The passages prayed in aid by Mr Nguyen are simply shorthand references to that offence.

Trafficking, on the other hand, is the end result of the activities of the storekeeper or courier and it is even more serious than possession for the purposes of unlawful trafficking. It cannot be right, in our view, that the quantity found can be the only criterion upon which sentence is based even though the maximum sentence provided by the legislation is the same for each offence. It is undoubtedly a relevant factor for the consideration of a sentencing judge but the overall consideration must be the actual selling of these drugs to the public. The internal scale within the maximum permitted must be graduated to the nature of the offence charged. We do not therefore think that the tariffs in *Chan Chi-ming* are applicable where the charge is that of direct trafficking.”

1. More recently, in *HKSAR v Islam Azharul*[[76]](#footnote-76), Zervos JA said of an appellant, a Form 8 recognizance holder, who was intercepted by the police when emerging from his room in a guesthouse for which he was paying $240 per day, carrying four kinds of dangerous drugs in over 90 **‍**small packets worth more than $73,000, an electronic scale, a knife with traces of cocaine and Ecstasy and $1,800 in cash[[77]](#footnote-77):

“We observe, however, that the facts in this case reveal that *the* ***‍****appellant was heavily involved in the packaging and dissemination of the dangerous drugs and as a consequence this heightened his culpability or aggravated his offending*. We consider that an enhancement of 6 months’ imprisonment would be appropriate for this factor, although we point out that *this is a matter that could easily have been taken into account when determining the starting point that should be adopted. As a matter of general principle, a starting point is based on the gravity of the criminal conduct and the responsibility for it by the offender.*” (Emphasis supplied)

1. And most recently, in *HKSAR v Islam Shafiqul*[[78]](#footnote-78), McWalters **‍**JA held[[79]](#footnote-79):

“(The respondent) asserted that the appellant’s role was more than that of a mere courier. *Determining whether the appellant had a more culpable role in the commission of this offence depends on what can be inferred from the Summary of Facts which he admitted and which was used for his sentencing*. This document reveals that the appellant had a key to premises in which dangerous drugs were being stored and in which there were an electronic scale and a large quantity of resealable plastic bags. Furthermore, the appellant’s fingerprints were found on a notebook and on pieces of paper both of which were suspected of being used to record drug transactions. Finally, there was an amount of HK$36,170 in cash, which is a very large amount of money for an unemployed asylum seeker whose sole source of income should be a welfare payment. *The only reasonable inference is that, together with D1, the appellant was operating a packaging and distribution centre for dangerous drugs*.” (Emphasis supplied)

1. The principles which emerge from these and other authorities are, firstly, that the role and culpability of the trafficker is an important consideration in identifying the starting point for this offence. Secondly, the sentencing guidelines were intended for couriers and storekeepers of dangerous drugs, which includes those who are found dealing with dangerous drugs in circumstances falling short of actual or direct trafficking in the sense of dissemination on the streets. Thirdly, actual or direct trafficking of dangerous drugs to others on the streets is more serious than where a defendant’s purpose cannot be proved or explained.

#### *F.3.6.3. The manager or organiser*

1. Above the defendant who is actually trafficking or disseminating drugs on the streets is the manager or organiser of those who are dealing in, or distributing, drugs on his behalf. In *HKSAR v Chung* ***‍****Ka* ***‍****Lun*[[80]](#footnote-80), where the co-accused had testified for the prosecution that he would deliver dangerous drugs at the instruction of the applicant to various different customers, for which he would then be rewarded with money as well as drugs for his own consumption, the Court declared[[81]](#footnote-81):

“When it is clear that a defendant is more than a mere courier of dangerous drugs, as in this case the organiser of a conspiracy to supply ‘Ice’ to drug addicts, it is right that the sentence should be enhanced to reflect this more culpable role.”

#### *F.3.6.4. The operator or financial controller*

1. Above the manager or organiser of the distribution or trafficking of dangerous drugs, is the operator or financial controller of organised trafficking, who is making substantial gains from the trade of trafficking in dangerous drugs. There is a useful analysis of the roles of different defendants in trafficking cases in *R v Xiong Xu and Others*[[82]](#footnote-82), albeit in the context of the cultivation of cannabis, where the functions of those involved in such an offence are necessarily different. Nevertheless, those who control and finance what are described as “extremely profitable” drugs operations are placed at the highest end of the hierarchy above those who organise such operations[[83]](#footnote-83).

#### *F.3.6.5. The international operator or financial controller*

1. Finally, where the defendant is the organiser or controller of a large and lucrative commercial operation which transcends jurisdictional boundaries, including the border with the Mainland, he will be in an even more serious position.
2. We emphasise that these are the most common categories of trafficker likely to be encountered in practice by the courts in Hong Kong. It may be that there are some forms of trafficking which do not fit neatly or precisely into a particular category, or, indeed, others where the functions overlap to a greater or lesser extent. Where a defendant’s role and culpability fall in determining the starting point must be a matter for the sentencing judge based on the evidence before the court.

### *F.3.7. The relevant band within the guidelines*

1. Having assessed the defendant’s role and culpability, the sentencing judge will then, as a third step in the sentencing process, identify where in the relevant band of the guidelines the defendant comes; always bearing in mind that it may, in appropriate circumstances, be necessary to go outside that band (whether above or below), given the particular circumstances of the commission of the offence and the role of the defendant. The matter was succinctly put by Keith JA, when granting leave to appeal in *HKSAR v Leung Kwai Ping*[[84]](#footnote-84):

“The offender’s role in the drugs trade is, however, a highly relevant factor in deciding *at what point within the tariff* his sentence should be.” (Original emphasis)

### *F.3.8. Aggravating factors*

1. Having identified the starting point by reference to the quantity of the dangerous drugs and the role and culpability of the defendant, the sentencing judge will, fourthly, consider the factors which bear on the eventual starting point to be adopted (which is better referred to as ‘the notional sentence after trial’ in order to distinguish it from the ‘starting point’, since strictly speaking a ‘starting point’ is that figure determined before consideration of aggravating and mitigating factors[[85]](#footnote-85)). In the special supplement to the United Kingdom Archbold **‍**2021 concerning *Sentences & Orders on Conviction (Sentencing Code)*[[86]](#footnote-86), ‘aggravating factors’ are defined as:

“those factors which indicate a higher level of culpability on the part of the offender or greater degree of harm than that inherently present in the offence. The presence of such factors aggravates the seriousness of the offending, and accordingly increases the appropriate sentence. Aggravating factors must always be considered in the context of the offence itself, and factors indicating harm or culpability which form an inherent part of the offence should not be “double-counted”.”

1. Some of those factors, in the context of sentencing for drug trafficking offences, have been identified by the Court in *Lau* ***‍****Tak-ming & Anor*, but they are by no means exhaustive. The Courts have established, for example, that a previous conviction for trafficking in dangerous drugs[[87]](#footnote-87), the carrying of dangerous drugs across the border[[88]](#footnote-88), the dealing in more than one type of dangerous drug[[89]](#footnote-89) and the use of young persons or minors to carry or deal in dangerous drugs[[90]](#footnote-90) will justify an enhancement of the starting point for sentence.
2. However, it is right that if a judge appears to have departed **‍**significantly (in either direction) from the starting point indicated **‍**arithmetically, then the departure should be explained: see **‍***Smit* ***‍****Hector* ***‍****Edward*[[91]](#footnote-91). This requires the judge to evaluate and explain the defendant’s role in assessing culpability and allows the appellate Court to understand the basis of the sentence and fulfil its function in reviewing the propriety of the sentence. It also enables other defendants charged with similar amounts to understand why the judge has sentenced in the way as he has. It is important that judges, counsel and defendants understand that comparisons between cases are of limited utility because one is not simply comparing the quantity and sentence in one case with the quantity and sentence in another. There are, as we have explained, other factors which may go to the gravity of the offence and the role and culpability of the defendant in a particular case, the assessment of which is within the discretion of the sentencing judge.

### *F.3.9. Mitigating factors*

1. Fifthly, the judge tasked with passing sentence will have regard to any matters of mitigation, always bearing firmly in mind that in this particular branch of criminal sentencing, as we and countless other appellate courts have said before, personal circumstances will count for little, unless they are exceptional. As the Court in *Abdallah* also emphasised[[92]](#footnote-92):

“As for mitigation, the grievousness of the offence – a description that is born of the recognition of the dreadful misery caused to victims and their families and the serious harm to society generally – dictates that meaningful mitigation, apart from the plea of guilty, is rarely available.”

1. One peculiar feature in this area of sentencing concerns the defendant who claims that he was not trafficking in all of the drugs found in his possession. Where a “significant proportion” of the dangerous drugs found in a defendant’s possession are accepted or shown to be for his own consumption, the sentence may be reduced[[93]](#footnote-93).

#### *F.3.9.1. Is the one-third discount the ‘high watermark’ for a timely plea?*

1. It is here that we must engage Mr Walsh’s argument as to whether other mitigation, that is other than the plea of guilty and any assistance to the authorities, comes into play so as, effectively, to lower the **‍**starting point before the discount for plea is considered, rather than **‍**to **‍**increase the overall discount. This argument derives from paragraph (iv)(c) of the questions raised by the Single Judge when granting leave in the present case. The short answer is that mitigation comes at the final stage, when assessing the overall discount from the starting point. Although the answer seems obvious, we think that what may have prompted the Single Judge’s query and Mr Walsh’s argument is the statement originally made by Stuart-Moore JA (as he then was) in *HKSAR* ***‍****v Wong Chi-ming*[[94]](#footnote-94) that “[a] one-third discount is really to be regarded as the high watermark for a plea entered at the earliest opportunity…”.
2. In *HKSAR v Leung Shuk-man*[[95]](#footnote-95), Stuart-Moore ACJHC (as he had by then become) again held:

“In any event, the Appellant was given a one-third discount which is *normally* to be regarded as the high watermark of the discount accorded to a defendant showing remorse by pleading guilty, whether or not a defendant is able to claim previous ‘good character’ in the sense of ‘clear record’.” (Emphasis supplied)

In *HKSAR v Tang Kai-hi*[[96]](#footnote-96), the same judge had used the word *usually* in place of *normally* to explain the limit of the one-third discount; while in *HKSAR v Yan Wai Ming*[[97]](#footnote-97), he explained:

“The one-third discount is *usually*, as we have said on numerous occasions, to be taken as the high watermark of the discount *unless there are very special factors to be taken into account*.” (Emphasis supplied)

#### *F.3.9.2. The position post-Ngo Van Nam*

1. Since the above four cases were heard, of course, the courts have applied a new sentencing regime for discounts following the decision in *Ngo Van Nam*, whereby the range of discounts now depend upon the stage at which guilty pleas are tendered. Although the “high watermark” reference to discount “normally” or “usually” applies to the vast majority of cases in which a plea is entered at the earliest opportunity, “unless there are very special factors to be taken into account”, the one-third discount was not intended to be an impenetrable ceiling beyond which a judge cannot go if he has good reasons in the proper exercise of his discretion for doing so. In reality, in the context of drug trafficking cases, sentencing judges are sometimes required to go beyond the one-third discount for various levels of assistance to the authorities; such as the giving of information which is of practical use, the giving of evidence or being ready to give evidence, successful or sometimes genuine, protracted participation in a controlled delivery, unconscionable delay and positive good character (which, as the authorities make clear, means something more than a clear record).
2. We do not accept that certain forms of mitigation should, therefore, be taken into consideration *before* the discount for plea is considered. In our judgment, the proper approach to all mitigating circumstances, and the approach least likely to lead to confusion, disparity and the distortion of the sentence, is to consider them at the same time when assessing the overall discount from the notional sentence after trial.

### *F.3.10. Totality*

1. The sixth, and final, stage of the sentencing process is for the judge to stand back and look at the overall sentence passed in order to ensure that it is a fair, just and balanced sentence in all the circumstances of the offence and the offender. Where there is more than one count or charge involved, or more than one aggravating feature justifying enhancement of the starting point, the sentencing judge must be careful that the ultimate sentence is not out of proportion to the defendant’s overall criminality. As Zervos JA put it in respect of the accumulation of enhancements for aggravating features in *Islam Azharul*[[98]](#footnote-98):

“Having specified the enhancements given for the aggravating factors, it is important for the sentencing court to ensure that the aggregation of the enhancements does not result in an oppressive and overloaded sentence, and by the application of the totality principle this will require determining an appropriate effective total of the enhancements.”

Similar statements have recently been made by this Court in *HKSAR v Ali ‍Qasim*[[99]](#footnote-99) and *HKSAR v Islam Shafiqul*[[100]](#footnote-100).

### *F.3.11. Conclusion*

1. Accordingly, we do not think that the notion of a discretionless starting point based upon the quantity of a dangerous drug alone is a correct, or a particularly helpful, way of looking at sentencing in drug trafficking cases. And, as Mr Lui has pointed out, it is certainly not helpful when dealing with cases involving more than one charge or count, or more than one type of dangerous drug. The danger of such a discretionless approach is that it makes the same erroneous assumption as Stuart-Moore ACJHC made in *Manalo*, that there is a precise arithmetical starting point for anyone who comes within the general description of ‘courier’ or ‘storekeeper’, which is a label that can be applied to the majority of trafficking cases coming before the courts. In reality, however, there are different couriers and different storekeepers and, therefore, different degrees of culpability. Indeed, sometimes, a defendant’s actions may fall short of either classification. The sentencing court must have a discretion in *all* cases to assess the role and culpability of the defendant when deciding where in the sentencing band (or, perhaps, outside the band) the defendant falls.
2. We note that the five-member New Zealand Court of Appeal in its decision in *Zhang*, whilst acknowledging the force of the Australian **‍**High Court’s reservations about weight-based guidelines in *Wong*, was not prepared to dispense with quantity as “the first determinant of sentencing”. The Court explained that “[q]uantity remains a reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it”[[101]](#footnote-101), whilst emphasising that quantity alone could not determine culpability. Variations in starting points in respect of the same quantity are explicable on the basis of differing degrees of culpability derived from the different roles played by offenders. Sentencing involves a full evaluation of the circumstances to achieve justice in an individual case[[102]](#footnote-102).
3. In our judgment, the danger of a strict arithmetical approach is that a defendant’s role can become eclipsed as long as the defendant can be said to fit within the label of a ‘courier’ or ‘storekeeper’. The arithmetical approach is at its most obvious and extreme where sentences are arrived at with such precision that they are expressed in years, months, weeks and **‍**even days[[103]](#footnote-103). If a judge of the High Court or District Court (different **‍**considerations may apply in a magistrate’s court) finds himself or herself resorting to quantifying a starting point or an eventual sentence for trafficking in a term that involves weeks or days, then he or she is almost certainly adopting a discretionless approach to sentencing based on arithmetic alone, rather than a discretionary approach based on the gravity of the offence (as reflected principally in the nature and quantity of the dangerous drug concerned) and the role and culpability of the defendant.

# *Ground 2*

## G.1. Does the Court of Appeal have jurisdiction to deal with an appeal against a forfeiture order?

1. There has been some lingering controversy as to whether an order for forfeiture forms part of the sentence. Although various Courts, in both the English and Chinese divisions of the Court of Appeal, have consistently held over many years that a forfeiture order forms part of the sentence which may be appealed[[104]](#footnote-104), and in consequence entertained numerous appeals by appellants against forfeiture orders[[105]](#footnote-105), it has been doubted whether the Court has jurisdiction to entertain such an appeal. In *HKSAR v Valencia*[[106]](#footnote-106), McWalters JA went so far as to caution that:

“The fact that the Court of Appeal has always treated a forfeiture order as part of the sentence of an offender does not mean that such an approach is correct.”

While, in a decision on a Single Judge leave application in *HKSAR v Chukwuleta* ***‍****Sunday ‍Freedaline & Anor*[[107]](#footnote-107), he held:

“Furthermore, in my view, notwithstanding past Court of Appeal practice to the contrary, there is a large question mark over whether an appeal against sentence can be used as an appeal mechanism for appealing a forfeiture order.”

Indeed, it was because of the reservations he had expressed in *Valencia* as to jurisdiction that McWalters JA gave leave to appeal the forfeiture order in the present case.

1. We consider it necessary to address this controversy, so as to lay to rest any doubt about the legitimacy of such appeals. In doing so, we should point out that counsel for both the appellant and respondent in this appeal were entirely *ad idem* on the issue and have each submitted that this Court does have jurisdiction to entertain an appeal against forfeiture.
2. As we have noted, the appellant pleaded guilty before a magistrate and was thereby committed to the High Court for sentence. Accordingly, her appeal against sentence fell within section 83H of the Criminal Procedure Ordinance, Cap 221 (“the CPO”), which provides:

“1) This section has effect for providing rights of appeal against sentence when a person is dealt with by the Court of First Instance (otherwise than on appeal from a magistrate) for an offence of which he was not convicted on indictment.

2) The proceedings from which an appeal against sentence lies under this section are those where an offender **−**

a) is committed by a magistrate under section 81B(3) of the Magistrates Ordinance (Cap. 227); or

b) having been made the subject of a probation order or an order for conditional discharge or given a suspended sentence, appears or is brought before the court to be dealt with for his offence.

3) An offender dealt with for an offence in the Court of First **‍**Instance in a proceeding to which subsection two applies may appeal to the court of appeal in any of the following cases **−**

a) where either for that offence alone or for that offence and other offences for which sentence is passed in the same proceeding, he is sentenced to imprisonment for a term of 6 months or more; or

b) where the sentence is one which the court convicting him had not power to pass; or

c) where the court in dealing with him for the offence makes in respect of him **−**

(i) a recommendation for deportation; or

(ii) an order disqualifying him from holding or obtaining a driving license to drive a motor vehicle under part 8 of the Road Traffic Ordinance (Cap. 374); or

(iii) an order under section 109C.

4) For the purposes of subsection (3)(a), any 2 or more sentences are to be treated as passed in the same proceeding if **−**

a) they are passed on the same day; or

b) they are passed on different days but the court in passing any one of them states that it is treating that one together with the other or others as substantially one sentence, and consecutive terms of imprisonment and terms which are wholly or partly concurrent are to be treated as a single term.”

1. Section 83H is to be read together with section 80(1) of the CPO, which provides that:

“‘sentence’ (刑罰), in relation to an offence, includes any order made by a court in dealing with an offender, including a hospital order…”.

1. On the other hand, section 83G governs an appeal made by a person convicted of an offence on indictment, who:

“may appeal to the Court of Appeal against any sentence (not ***‍***being a sentence fixed by law) *passed on him for the offence*, whether passed on his conviction or in subsequent proceedings”. (Emphasis supplied)

1. The material difference between the two sections is the term “passed on him for the offence” in section 83G, which is absent from section ***‍***83H. It may be noted that these statutory provisions are modelled on, and closely resemble, sections 9 and 10 of the Criminal Appeal Act, 1968 in the United Kingdom.
2. As we have said, counsel for both the appellant and the respondent were in agreement that a forfeiture order is properly to be considered part of the sentence imposed upon a defendant. And as such, the Court of Appeal has jurisdiction to deal with a forfeiture order on an appeal against sentence.
3. The issue before this Court therefore, is whether or not someone *convicted* of an offence on an indictment (as provided for in section 83G) necessarily has a more restrictive right to appeal against his ‘sentence’ than someone who pleads guilty in a magistrate’s court and is “dealt with by the Court of First Instance (otherwise than on appeal from a magistrate) for an offence of which he was not convicted on indictment”, as in section 83H of the CPO.
4. In *Valencia*, McWalters JA saw the issue in this way[[108]](#footnote-108):

“Where a defendant is committed by a magistrate to be sentenced by a judge of the Court of First Instance of the High Court, the defendant has a right of appeal against sentence under section **‍**83H of the CPO. Section 83H in referring to the right of appeal, does not employ the limiting words ‘passed on him for the offence’. Whether this section creates a separate, free standing right of appeal different from that in section 83G or whether it simply extends the section 83G right of appeal to persons committed for sentence by a magistrate, is a matter that would have to be fully argued.”[[109]](#footnote-109)

1. The appellant’s case is that, since she was committed to the **‍**Court **‍**of First Instance for sentence, and as the forfeiture order was made there, her case falls within section 83H(1) and (2) of the CPO, as distinct from section **‍**83G, which deals with convictions on indictment. The sentence imposed on the appellant was one of 5½ years’ imprisonment, making it a term of imprisonment of 6 months or more; the forfeiture order, when considered together with the sentence of imprisonment, also therefore falls within section 83H(3)(a).
2. In *Valencia*, McWalters JA went on to say[[110]](#footnote-110):

“The making of a forfeiture order is regarded as a civil process against property and it need not be property of a defendant. It does not deal with the offender personally and it may take place, as happened with this applicant, after the sentencing process has been completed. It is therefore arguable whether such an order can be construed as part of the sentence imposed by the judge on the applicant.”

1. Mr Walsh, for the appellant, relied on *HKSAR v* *Shoki* ***‍****Fatuma* ***‍****Ramadhani*, where Lunn V-P , giving judgment on behalf of the majority, held that “the order of forfeiture fell to be regarded as a matter ***‍***of sentence, rather than conviction”[[111]](#footnote-111). We should point out (and **‍**we **‍**shall **‍**return to this matter again later) that the applicant in *Shoki* ***‍****Fatuma* ***‍****Ramadhani* had made a further application by counsel for leave to appeal to the Court of Final Appeal against a forfeiture order made under section 56(1) of the DDO, which application was dismissed on the facts by the Appeal Committee[[112]](#footnote-112). Mr Lui, for the respondent, submits that despite McWalters ***‍***JA’s reservations in *Valencia*, section 80 is nonetheless drafted widely enough to include within its definition of ‘sentence’, *any order* made by a court in dealing with an offender, which order must include a forfeiture order.

### *G.1.1. A comparison with the law in England and Wales*

1. Mr Lui referred us to the decision of the English ***‍***Court of Appeal in *R v Hayden*[[113]](#footnote-113). The appellant in that case had been convicted of unlawful possession of cannabis, fined and ordered to pay the costs of the prosecution. He appealed against the order that he should pay the costs of the prosecution. The Court held that an order to pay the costs of the prosecution was a ‘sentence’ within the meaning of section 50(1) of the Criminal Appeal Act 1968. Section 50(1) of the Act provides, in similar language to section 80 of the CPO:

“In this Act, ‘sentence’, in relation to an offence, includes any order made by a court when dealing with an offence (including a hospital order…) and also includes a recommendation for deportation.”

1. The Court in *Hayden* explained[[114]](#footnote-114):

“The essential key to the meaning of “sentence” in this context in our opinion is that it is an order, and it is an order made by a court when dealing with an offender, and we think that means when dealing with someone who has offended in respect of his offence. Those then are the features to which one must look in deciding whether a particular direction, to use a neutral word, made by a court is a sentence for the purposes of the Act of 1968.

Having looked at the definition of “sentence”, one can go back and see the power given by the same Act to a person to appeal against his sentence, and this is found in section 9:

‘A person who has been convicted of an offence on indictment may appeal to the Court of Appeal against any sentence (not being a sentence fixed by law) passed on him for the offence, whether passed on his conviction or in subsequent proceedings’.”

Pausing here, it will be seen that section 9 of the Criminal Appeal Act 1968 is *in pari materia* (indeed, its terms are identical) with section 83G of the CPO. The Court continued[[115]](#footnote-115):

“The language of that section, looked at without reference to authority or the history of the matter, again seems to us to be tolerably simple. The right to appeal to this court under section ***‍***9 is restricted to someone who has been convicted of an offence on indictment. The importance of those words is to distinguish a case falling within section 9 from a case falling within section 10 where the conviction was not on indictment. Section 9 is concerned with a person who has been convicted on indictment, and that includes the present appellant.

The words ‘passed on him for the offence’ contained in that section have given rise to some speculation because they are new. They did not appear in the corresponding provisions of the Criminal Appeal Act 1907 which was the foundation of the Court of Criminal Appeal and not surprisingly those concerned in these matters have sought to give them a meaning. We think the meaning does not go beyond this, that the section is making it clear that conviction of an offence on indictment is the key to an appeal under section 9, and the remaining words are intended to show that all which may be appealed against is a sentence passed in respect of that offence of which he has been convicted on indictment. We see no reason to look for other difficulties in the language which, on the first reading of the section, do not really appear, and are content that so far as section ***‍***9 is concerned one should regard the key to availability of a right to appeal to this court as being that that the defendant has received a sentence in respect of an offence for which he was convicted on indictment*.*”

1. The Court concluded that the power to order a defendant to pay the costs of the prosecution[[116]](#footnote-116):

“…is a power which seems to us to fit the definition of ‘sentence’ in section 50 exactly. First of all, it is an order. It is not a recommendation but an order, and furthermore it is an order which is contingent upon there having been a conviction and it is contingent on the person by whom the payment is to be made, having been convicted in that way.”

1. By way of contrast, in *R v Thayne*[[117]](#footnote-117), the English Court of Appeal held that it had no jurisdiction to entertain an appeal against an order for the estreatment of a bail recognisance, with 6 months’ imprisonment imposed in default, because it was not a sentence “passed on **‍**him for the offence”, within the meaning of section 9 of the Criminal **‍**Appeal Act 1968. The Court held[[118]](#footnote-118):

“…wide as those words may be, once they are written into section 9 in place of the word “sentence”, the fact remains that the limiting words remain, namely, that the sentence must be passed on him for the offence. In those circumstances, odd as it may seem, this court has no jurisdiction whatever to interfere with that part of the recorder’s order.”

*Thayne* was applied by Yeung VP in *HKSAR v Chan* ***‍****Yuen Yee Carrie*[[119]](#footnote-119), where the appellant had also appealed the trial judge’s estreatment of her bail money of $40,000, she having failed to attend her trial for burglary in the District Court. The Court in *Chan Yuen Yee Carrie* likewise declined to assume jurisdiction on appeal against the judge’s order.

1. However, as both Mr Walsh and Mr Lui have correctly submitted, *Thayne* and *Chan* ***‍****Yuen* ***‍****Yee* ***‍****Carrie* can readily be distinguished on the basis that they were concerned with procedural matters arising from court proceedings, which were not related to the defendant’s offending or the sentencing for that offending.

### *G.1.2. The application of section 56(1)(a) of the DDO*

1. It was Mr Walsh’s further argument that no forfeiture order could lawfully be made under section 56(1) of the DDO unless the money (or ***‍***thing) in question had been “used in the commission of or in connection with” an offence under the Ordinance (section 56(1)(a)), or unless the money (or other property) had been “received or possessed as a result or product of” such an offence (section 56(1)(b)). Since there must be a nexus between the money (or thing or other property) and the offence, a forfeiture order could properly be described as a ‘sentence’ imposed on the defendant for the offence.
2. Mr Lui submits that, notwithstanding the civil nature of forfeiture proceedings, they are nonetheless penal in nature. In *Attorney* ***‍****General v So Lo-kam*[[120]](#footnote-120), a magistracy appeal, de Basto J cited the observations of Hogan CJ in *Attorney-General v Chin Chack-wing* [[121]](#footnote-121) that “the forfeiture provisions of this section were put into the (Dutiable ***‍***Commodities) Ordinance for the purpose of enforcing it and serving as a deterrent against its contravention, that is, that forfeiture provisions are penal and deterrent in nature”[[122]](#footnote-122).
3. Mr Lui relies on a similar conclusion having been reached by the House of Lords in *Customs and Excise* ***‍****Commissioners v Menocal*[[123]](#footnote-123), where it was held that a forfeiture order made pursuant to section 27 of the Misuse of Drugs Act 1971 came within the definition of ‘sentence’ as defined by section 57 of the Courts Act 1971; the definition being effectively the same as that in section 50 of the Criminal Appeal Act 1968 and section 80 of the CPO. In allowing the appeal against the forfeiture of £4,000, Lord ***‍***Salmon held[[124]](#footnote-124):

“In my view, it is important to remember that the word ‘sentence’ in relation to an offence is defined in section 57 of the Courts Act 1971, unless the context otherwise requires, as including ‘any order made by a court when dealing with an offender’. … The argument that an order that an offender shall forfeit a sum upwards of £4000 is solely for the public good and not by way of punishment is, in my respectful opinion, unsound and contrary to common sense. All prison and other sentences against a convicted person, including money penalties and forfeitures of money in relation to an offence, have two purposes (1) to punish the offender and (2) to support the public good by discouraging the offender and other potential criminals from committing such an offence in the future.”

## G.2. Discussion as to the lawfulness of an appeal against a forfeiture order

1. In *Menocal*,Lord Salmon and Lord Edmund-Davies specifically referred to the earlier decision of the Court of Appeal in *Thayne*[[125]](#footnote-125): clearly, they could not have been unaware of the argument concerning section 9 of the Criminal Appeal Act 1968 and the limiting words “passed on him for the offence”. Yet the Court had no difficulty in holding that a forfeiture order was a ‘sentence’, which is both penal and deterrent in nature. We respectfully agree.
2. In our judgment, a forfeiture order made against a convicted offender is a “sentence … passed on him for the offence”, within the meaning of section 83G of the CPO, where ‘sentence’ is defined as including “any order made by a court in dealing with an offender”, under section 80 of the CPO. That has been the application of the law in Hong ***‍***Kong since at least the decision in *HKSAR v* *Chai Man-fong* in 1998, where this Court held that a convicted offender can properly bring an appeal against a confiscation order made under section 102 of the CPO. In *Chai Man-fong*, the respondent had sought to argue that there was no right of appeal against a confiscation order made under section 102 of the CPO, since section 80 did not encompass an order under section 102. Power ***‍***VP, giving the judgment of the Court, did not agree:

“We are satisfied that the word ‘order’ in s.80 includes an order made under s.102 and that by virtue of s.83G, there is a right of appeal against such an order. We have been referred to the case of *Multi* ***‍****Solid Ltd v Secretary for Justice*, [1997] 3 HKC 253, it being suggested that this matter may have some application to the present appeal. We are satisfied that the circumstances in that case were very different from those that obtained here. The appellant there was not the defendant at trial and had no *locus* ***‍****standi*, either at trial or on appeal. That authority does not assist in any way in the consideration of the circumstances before us. We are satisfied that there is a right of appeal against the confiscation order made under s.102 and will proceed to hear the argument of the applicant.”

This approach, which is entirely consistent with the approach in England and Wales since 1975, has been followed in both divisions of this Court ever since. And, as we observed above[[126]](#footnote-126), the Appeal Committee of the Court of Final Appeal has likewise had no difficulty in dealing on the merits with the application of *Shoki Fatuma Ramadhani* against this Court’s dismissal of her appeal against a forfeiture order made under section 56(1) of the DDO. There should no longer, with respect, be any question mark over the jurisdiction of this Court to entertain an appeal against any order for forfeiture made against a convicted person under the DDO.

## G.3. The parties’ submissions on Ground 2

### *G.3.1. The appellant’s submissions on Ground 2(i)*

1. The appellant submits the judge’s reasons for making the forfeiture order were wholly inadequate, with no clear reasons and no finding that the money had been used in the commission of, or in connection with, a drugs offence.
2. In giving his reasons for making the forfeiture order, the judge referred to *HKSAR v Ngoma Juma Shabani*[[127]](#footnote-127), where the Court held that in most cases involving a plea of guilty, a *prima facie* connection between the money found on a defendant and the offence would be obvious from the Summary of Facts[[128]](#footnote-128).
3. Although the judge found that much of the appellant’s evidence was untrue and an attempt to confuse the court[[129]](#footnote-129), Mr Walsh complained that the judge did not identify any basis for disbelieving the appellant. More importantly, it was necessary to identify the legal basis upon which the forfeiture order was being made, in particular under which limb (or limbs) of section 56(1) of the DDO the order was being made. In making the latter submission, he relied on the dissenting judgment of McWalters ***‍***JA in *Shoki Fatuma Ramadhani* to the following effect[[130]](#footnote-130):

“In the context of an application where a party is making an application adverse to the legal right of another party it is surely incumbent on the applying party to identify on what legal basis he makes that application and on what evidence he relies, if evidence is necessary, in order to satisfy the court that the order he seeks should be made. If evidence is necessary then it will be the evidence of what a witness actually says and not of what the witness would say, unless of course the witness’ evidence is not in dispute and can be placed before the court by means of an agreed witness statement or an admitted set of facts.

Thus, in an application for forfeiture the first question a court must ask is pursuant to what statutory provision is the application being made? It is the statutory provision which invests the court with the power to accede to the application; which sets out the parameters of the court’s power and which identifies the matters of which the court must be satisfied before exercising the power adversely to anyone. This was not done in the present case but it is the respondent’s position that the relevant power is s.56(1) of the Dangerous Drugs Ordinance.”

1. In similar vein, Mr Walsh placed reliance on the separate judgment of McWalters JA in *Ngoma Juma Shabani*, who had agreed with the result of the appeal but not the reasoning of the majority, when he said[[131]](#footnote-131):

“In respect of an application under s.56(1) of the Ordinance, informing the party against whom a forfeiture order is made of the legal basis for the order requires that this person be informed not just that the order is made under s.56(1) but of the particular limb or limbs of that statutory provision which the judge has found proven.”

### *G.3.2. The respondent’s submissions on Ground 2(i)*

1. Mr Lui submits it would have been surprising if the judge had come to any other conclusion on the facts than the one he did. The prosecution had made its application for forfeiture under section 56(1) of the DDO, without identifying on which limb of the sub-subsection it was relying. Since the majority in *Ngoma Juma Shabani* had held that it was not necessary to identify which of the two limbs under section 56(1) was being relied upon[[132]](#footnote-132), it was not useful to rely on a dissenting judgment in *Shoki Fatuma Ramadhani*, or the *obiter* remarks of the same judge in *Ngoma Juma Shabani*, which were at variance with the majority. In any event, the argument was redundant, since the judge had specifically identified the limb under which he was making his order, namely section ***‍***56(1)(a) of the DDO[[133]](#footnote-133). Accordingly, there was nothing imprecise or ambiguous about the judge’s actual order.
2. The respondent further pointed out that, before he concluded that the appellant had told a “cock and bull story”, the judge had made reference to prosecuting counsel’s cross-examination[[134]](#footnote-134) and the apparent inconsistencies in her account, which were obvious. Furthermore, when the appellant was confronted with documents she could not explain, she had resorted to blaming her legal representatives[[135]](#footnote-135).
3. The respondent submits the procedure laid down in *Ngoma ‍Juma Shabani* had been properly and fairly followed, insofar as the judge:
4. had set out the factual premise of the applicant’s guilty plea[[136]](#footnote-136);
5. was satisfied there was a *prima facie* connection between the sum of US$1,800.00 and the trafficking offence, to which the appellant had pleaded guilty[[137]](#footnote-137); and
6. had adjourned the matter to allow the appellant time to obtain supporting documents from Tanzania before hearing evidence from the appellant over the course of two days[[138]](#footnote-138).

### *G.3.3. The appellant’s submissions on Ground 2(ii)*

1. The appellant submits that, even if the money was connected to drug trafficking, it had not been used in the commission of, or in connection with, an offence, nor was it possessed or received as a result of an ***‍***offence under the DDO, or the Drug Trafficking Recovery of Proceeds ***‍***Ordinance, Cap 405.
2. The appellant thus relies on a literal interpretation of the term “which *has been used* in the commission or in connection with…”an offence under the DDO, submitting that, at most, the appellant possessed the money for the future purpose of maintaining herself in Hong Kong, whilst waiting for her body to discharge the drugs. The appellant had not, therefore, actually spent or used any money because she was immediately intercepted upon her arrival in Hong Kong.
3. He accepts that in *Ngoma Juma Shabani*, Macrae ***‍***JA (as **‍**he **‍**then was) had rejected the argument that, in order for money to be successfully forfeited under section ‍56(1)(a), it would have to be shown to have been used for some purpose connected to drug trafficking in Hong **‍**Kong, since “[i]f that were the law, there would invariably be no money to forfeit (unless perhaps paid over to a law enforcement agent in Hong Kong) and, far from casting the net as widely as possible, s.56(1)(a) would be rendered almost useless”[[139]](#footnote-139). However, in *Ubah Joel Chidiebere*, the Court had commented that section 56(1)(a) of the DDO appeared to be[[140]](#footnote-140):

“… unnecessarily and undesirably restrictive in its drafting by limiting the power of forfeiture to any money or thing ‘which *has been used* in the commission of or in connection with …’. The situation with most mules is that they possess money for the purpose of maintaining themselves whilst waiting for their bodies to discharge the drugs concealed within them. The sub‑section may be a more practical power if it was amended to encompass possession of the property for the purpose of facilitating the commission of a Cap 134 offence.”

### *G.3.4. The respondent’s submissions on Ground 2(ii)*

1. The respondent submits that the appellant’s restrictive interpretation of section 56(1)(a) is inconsistent with the majority decision in ***‍****Ngoma* ***‍****Juma* ***‍****Shabani*[[141]](#footnote-141)*.* Reliance on the *obiter* comments in *Ubah* ***‍****Joel* ***‍****Chidiebere* was misconceived, since the Court’s remarks were directed at how the scope of section 56(1)(a) of the DDO might be widened in the event of a legislative amendment; they did not purport to, and cannot, detract from the majority’s interpretation in *Ngoma Juma Shabani.*
2. Mr Lui argues that if the appellant’s narrow construction of section 56(1)(a) were correct, then the application of *Ngoma Juma Shabani* would effectively be restricted to cases “where the cash carried by an overseas trafficker is actually shown to law enforcement officers”; yet ***‍***that ***‍***is clearly not how the Court “has consistently applied *Ngoma* ***‍****Juma* ***‍****Shabani* in cases involving traffickers bringing cash into Hong Kong without presenting or showing it to the authorities”[[142]](#footnote-142).
3. Mr Lui cited a series of decisions of this Court[[143]](#footnote-143) decided since *Ngoma Juma Shabani,* comprising at least one of the members of the Court in *Ubah Joel Chidiebere*, all of which clearly accepted that if money is possessed by a defendant who is trafficking so as to enable him to pass himself off to Immigration or Customs officers as a legitimate visitor to Hong Kong, then that money will be considered to have been “used in the commission of, or in connection with” a relevant offence. This was so even where the defendant has been intercepted before actually producing or using the money.

## G.4. Discussion

1. This Court is bound by the majority decision in *Ngoma* ***‍****Juma ‍Shabani*. Not only are we bound by it but we consider it to be in accordance with a purposive construction of the law and consistent with common sense. In his judgment in *Ngoma Juma Shabani*, Lunn VP cited the English decision of *R v Osei (Gertrude)*[[144]](#footnote-144), where the appellant was found in possession of dangerous drugs and £2,550 upon her arrival at Heathrow **‍**Airport in London from Ghana. In respect of her possession of the cash, Glidewell ‍LJ held[[145]](#footnote-145):

“ … if a person wishes to enter this country as a visitor, broadly speaking, he or she has to satisfy the immigration officers that he or she has either in his or her possession or available to him or her somewhere in this country from somebody else, sufficient funds to enable him or her to stay here without charge to the United Kingdom during the period for which he or she wishes to remain here”.

As Lunn VP remarked, such requirements would apply in most countries, and certainly apply in Hong Kong: the appellant’s possession of US$4,500 in *Ngoma Juma Shabani* thus “enabled him to address that need”[[146]](#footnote-146).

1. It is noteworthy that the judge in the present case specifically applied the majority’s reasoning in *Ngoma Juma Shabani*[[147]](#footnote-147). In any event, as Mr Lui submitted, the argument that a judge must identify the specific limb of section 56(1) under which he is making the order is entirely otiose in this case because the judge expressly made his order under subsection (a) of section 56(1) of the DDO[[148]](#footnote-148).
2. We also observe that the facts presented by the appellant were remarkably similar to the case presented by the applicant in *Shoki* ***‍****Fatuma* ***‍****Ramadhani*, inasmuch as the defendants, who both happened to be Tanzanian women, were intercepted at Hong Kong International Airport for suspected drug trafficking and found to be in possession of a substantial amount of US currency, which they each claimed was for buying goods for their respective businesses in Tanzania. Both similarly claimed that they had not yet been paid any reward for ingesting and carrying, in one case, cocaine, in the other, heroin across the border into Hong Kong. In neither case did the prosecution identify which limb of section 56(1) it was relying on in making its application for forfeiture.
3. One of the points of law of great and general importance originally put forward by counsel before the Appeal Committee in *Shoki* ***‍****Fatuma Ramadhani* was: “During Forfeiture Proceedings, can an order be made granting the prosecution’s application where, a) the legal basis for the order was not identified…”[[149]](#footnote-149). At the hearing before the Appeal Committee, however, counsel accepted that the application was **‍**really one alleging a substantial and grave injustice and the Appeal **‍**Committee dealt with the matter on that basis. We think it very unlikely that the Appeal Committee, if it considered that the point about the lack of specificity as to which limb of section 56(1) was engaged had any merit, would have refused the application on the merits without comment on the point.
4. As to the merits of the application before us, the judge had the benefit of hearing the appellant at the forfeiture application. We cannot see any reason to disturb his findings. Indeed, having read her evidence, it would have been rather remarkable if he had come to any other conclusion.
5. We find no merit in the appeal against the forfeiture order and dismiss this aspect of the appeal.

# *Consideration of the proposed fresh evidence*

1. Once again, we are faced with a submission that an appellant has assisted Father Wotherspoon’s ‘campaign’ and, for that reason, coupled with information the appellant has given him, and which he has passed on to the authorities in the United States, she is “entitled” to a further discount on sentence. We can dispose very quickly of the claim that information has been given to Father Wotherspoon and passed on to the United States. This information was given more than 16 months after the appellant’s arrest and there is no basis for concluding that any of it was of any practical use. With great respect to Father Wotherspoon, if he is in receipt of information, it should be passed to the authorities in Hong Kong to process if they consider it necessary. Only then will the courts of Hong **‍**Kong be in a position to assess its practical value.
2. As for the appellant’s purported assistance to Father **‍**Wotherspoon’s ‘campaign’, this comprises a single 2-page letter written to Father Wotherspoon, which was subsequently published by him on an Internet forum. In the letter, the appellant described, *inter alia*, how she had in fact swallowed 88 packets of drugs, but discharged 82 of them *en route* to Hong Kong[[150]](#footnote-150). As a result, she was only arrested for trafficking in six packets of cocaine. Notwithstanding her claims that she was going to present herself to the police with the six packets upon arrival, nothing was said to the Customs officers who intercepted her. We have difficulty seeing how such a letter advances Father ***‍***Wotherspoon’s ‘campaign’ other than to show that yet another person has been caught trafficking drugs into Hong Kong.
3. This Court has already made it clear that no more than a “token” discount can be given for this factor[[151]](#footnote-151), which judges should assess realistically and with common sense. Whether they give any discount at all, or how they quantify a token amount, is a matter entirely within their discretion, which will not be lightly interfered with by an appellate court[[152]](#footnote-152). Having looked at the contents of the appellant’s letter, we would not have given any discount for her assistance to Father Wotherspoon’s ‘campaign’, particularly when the judge was dealing with 48.30 grammes of cocaine narcotic; the appellant having apparently already discharged most of what she had unlawfully planned to bring into Hong Kong. If defence counsel was in possession of this letter prior to mitigation, it is hardly surprising that she did not make use of it.
4. There is no merit whatsoever in the claim that the appellant is entitled to any discount of her sentence for this factor. Given the wide and absolute discretion afforded to sentencing judges on this matter, which can only attract a “token discount” at most, we hope not to see this sort of ground of appeal being put before us again.

# *I. Conclusion*

1. For the above reasons, the appeal against sentence, which includes the appeal against the forfeiture order, is dismissed.

|  |  |  |
| --- | --- | --- |
| (Wally Yeung)  Vice President | (Andrew Macrae)  Vice President | (Kevin Zervos)  Justice of Appeal |

Mr Ira Lui ADPP, of the Department of Justice, for the Respondent

Mr Wayne Walsh SC and Mr Joseph Lee, instructed by Gallant, assigned by the Director of Legal Aid, for the Appellant

1. McWalters JA. [↑](#footnote-ref-1)
2. Appeal Bundle (“AB”), p 16P-Q. [↑](#footnote-ref-2)
3. AB, p 41Q-U. [↑](#footnote-ref-3)
4. *HKSAR v Herry Jane Yusuph* [2019] HKCA 956, 26 August 2019, at [15]-[16]. [↑](#footnote-ref-4)
5. *Chan Chi-ming v R* [1979] HKLRD 491. [↑](#footnote-ref-5)
6. *Ibid.*, at 493. [↑](#footnote-ref-6)
7. All of the cases tabulated were heard in the High Court, save for two in the District Court. [↑](#footnote-ref-7)
8. *R v Lau Tak-ming & Anor* [1990] 2 HKLR 370. [↑](#footnote-ref-8)
9. *Attorney General v Pedro Nel Rojas* [1994] 2 HKCLR 69 at [70]. [↑](#footnote-ref-9)
10. *HKSAR v* *Kilima Abubakar Abbas* [2018] 5 HKLRD 88, *per* McWalters JA, at [148]. [↑](#footnote-ref-10)
11. *HKSAR v Abdallah* [2009] 2 HKLRD 437. [↑](#footnote-ref-11)
12. *HKSAR v Manalo* [2001] 1 HKLRD 557. [↑](#footnote-ref-12)
13. *HKSAR v Burnales* [2000] 4 HKC 636. [↑](#footnote-ref-13)
14. *Manalo*, at 560F-H; *Burnales*, at 639I- 640B. [↑](#footnote-ref-14)
15. *Kilima*, *per* McWalters JA, at [154]-[157]. [↑](#footnote-ref-15)
16. *Wong v The Queen* (2001) 207 CLR 584. [↑](#footnote-ref-16)
17. *Ibid*., at [74]-[75]. [↑](#footnote-ref-17)
18. *R v Williscroft* [1975] VR 292, at 300. [↑](#footnote-ref-18)
19. *Kilima*, *per* Macrae VP, at [71]. [↑](#footnote-ref-19)
20. *HKSAR v Chan Ka Yiu* [2018] 4 HKC 591. [↑](#footnote-ref-20)
21. *HKSAR v Godson Ugochukwu Okoro* [2019] 2 HKLRD 451, at [94]-[97]. [↑](#footnote-ref-21)
22. *Zhang & Ors v The Queen* [2019] NZCA 507. [↑](#footnote-ref-22)
23. *R v Fatu* [2006] 2 NZLR 72. [↑](#footnote-ref-23)
24. *Godson Ugochukwu Okoro*, at [96]. [↑](#footnote-ref-24)
25. *HKSAR v Nwadiuto Samuel Joseph* (Unrep., CACC 210/2016, 16 February 2017). [↑](#footnote-ref-25)
26. *Ibid.*, at [42]. [↑](#footnote-ref-26)
27. *HKSAR v Conde Nassou* (Unrep., CACC 427/2014, 29 January 2016). [↑](#footnote-ref-27)
28. *Ibid.*, at [34]. [↑](#footnote-ref-28)
29. *Ibid.*, at [36]-[39]. [↑](#footnote-ref-29)
30. *HKSAR v An unknown person alias Stojanovic Milka and Skopljak Sara* (Unrep., CACC 110/2010, 3 November 2010), at [12]. [↑](#footnote-ref-30)
31. *HKSAR v Leung Wai Man* (Unrep., CACC 24/2007, 7 December 2009), at [11]. [↑](#footnote-ref-31)
32. *Lau Tak-ming & Anor*, at 386F-G. [↑](#footnote-ref-32)
33. *HKSAR v Rawe Waikama Magarya* [2015] 5 HKC 438, at [28]. [↑](#footnote-ref-33)
34. *HKSAR v Kisamo Diana Semali* [2019] 1 HKLRD 256 at [13]-[18]. [↑](#footnote-ref-34)
35. *HKSAR v Fundi Furaha Giles* (Unrep., CACC 82/2017, 1 February 2019), at [22]-[23]. [↑](#footnote-ref-35)
36. *HKSAR v Camara Aboubacar* (Unrep., CACC 353/2017, 20 March 2019), at [20]. [↑](#footnote-ref-36)
37. *HKSAR v Zaripov Eduard* (Unrep., CACC 165/2018, 21 March 2019), at [31]. [↑](#footnote-ref-37)
38. The sentence was further enhanced by 1 year for the international element involved, making an enhanced starting point (or notional sentence after trial) of 21 years’ imprisonment. [↑](#footnote-ref-38)
39. *R v Milberry* [2003] 1 WLR 546. [↑](#footnote-ref-39)
40. *Ibid.*, at 556B-C. [↑](#footnote-ref-40)
41. *Wong*, at [5]. [↑](#footnote-ref-41)
42. *Ibid.*, at [6]. [↑](#footnote-ref-42)
43. *Kilima*, *per* Macrae VP, at [74]. [↑](#footnote-ref-43)
44. *Ibid.*, at [75]. [↑](#footnote-ref-44)
45. One of the criteria for the “Leading role” category, under the *Drug Offences Definitive Guideline* (*Guideline*) issued by the UK Sentencing Council. [↑](#footnote-ref-45)
46. One of the criteria for the “Significant role” category under the *Guideline*. [↑](#footnote-ref-46)
47. One of the criteria for the “Lesser role” category under the *Guideline*. [↑](#footnote-ref-47)
48. *Conde Nassou*, at [37]. [↑](#footnote-ref-48)
49. *Kilima*, *per* Macrae VP, at [71]. [↑](#footnote-ref-49)
50. *Nwadiuto Samuel Joseph*, at [41]. [↑](#footnote-ref-50)
51. *Lau Tak-ming & Anor*, at 386F-G. [↑](#footnote-ref-51)
52. *Stojanovic Milka*, at [12]. [↑](#footnote-ref-52)
53. *Kilima*, *per* Lunn VP, at [23]. [↑](#footnote-ref-53)
54. *HKSAR v Leung Wai Man* (Unrep., CACC 24/2007, 7 December 2009), at [11]. [↑](#footnote-ref-54)
55. *Nwadiuto Samuel Joseph*, at [40]. [↑](#footnote-ref-55)
56. *Rawe Waikama Magarya*, at [28], cited at para 34 *supra*. [↑](#footnote-ref-56)
57. *HKSAR v Tsang Ka Man* (Unrep., CACC 296/2017, 28 May 2018). [↑](#footnote-ref-57)
58. *Ibid.*, at [27]. [↑](#footnote-ref-58)
59. *Ibid.*, at [29]. [↑](#footnote-ref-59)
60. *Stojanovic Milka*, at [12]. [↑](#footnote-ref-60)
61. *R v Yavuz* [2018] SASCFC 24. [↑](#footnote-ref-61)
62. *Ibid.*, at [72]. [↑](#footnote-ref-62)
63. *Manalo*, at 559B-D. [↑](#footnote-ref-63)
64. *Ibid.*, at 559D-F. [↑](#footnote-ref-64)
65. *Lau Tak-ming & Anor*, at 386 E-F. [↑](#footnote-ref-65)
66. *Ibid.*, at 558J. [↑](#footnote-ref-66)
67. At [49] *supra*. [↑](#footnote-ref-67)
68. *Ibid.*, at 559A-B. [↑](#footnote-ref-68)
69. Section F.3.2. *supra*. [↑](#footnote-ref-69)
70. *HKSAR v Tam Yi Chun* [2014] 3 HKLRD 691. [↑](#footnote-ref-70)
71. *Secretary for Justice v Hii Siew Cheng* [2009] 1 HKLRD 1. [↑](#footnote-ref-71)
72. *Kilima*, *per* Lunn VP, at [24]; *per* Macrae VP, at [73]; *per* McWalters JA, at [146]. [↑](#footnote-ref-72)
73. *HKSAR v SK Wasim* [2020] 2 HKLRD 1139. [↑](#footnote-ref-73)
74. *R v Yeung Ying-kan & Anor* (Unrep., Crim App No 120 of 1984, 30 May 1984). [↑](#footnote-ref-74)
75. *Chan Chi-ming* *v R* [1979] HKLR 491. [↑](#footnote-ref-75)
76. *HKSAR v Islam Azharul* [2020] 1 HKLRD 644. [↑](#footnote-ref-76)
77. *Ibid.*, at [14]. [↑](#footnote-ref-77)
78. *HKSAR v Islam Shafiqul* (Unrep., CACC 210/2019, 28 October 2020). [↑](#footnote-ref-78)
79. *Ibid.*, at [29]. [↑](#footnote-ref-79)
80. *HKSAR v Chung Ka Lun* [2018] 4 HKLRD 229. [↑](#footnote-ref-80)
81. *Ibid.*, at [46]. [↑](#footnote-ref-81)
82. *R v Xiong Xu and Others* [2008] 2 Cr App R (S) 50, at [2]-[4]. [↑](#footnote-ref-82)
83. In the context of the cultivation of cannabis, the various roles in order of ascending culpability are (i) workers (or gardeners), who tend, grow and harvest the plants; (ii) managers, who make the arrangements for the plants to be brought in and the crop to be distributed; (iii) organisers, who play a part in setting up the operation by obtaining premises, workers and equipment etc; and (iv) controllers, who control a substantial number of such operations and stand to make substantial profits. In the context of other drug trafficking offences, however, managers and organisers play a similar role. [↑](#footnote-ref-83)
84. *HKSAR v Leung Kwai Ping* [2001] 4 HKC 383, 385. [↑](#footnote-ref-84)
85. See *HKSAR v Fok Ka Po Joe (No 2)* [2019] 2 HKLRD 1, at [15]. [↑](#footnote-ref-85)
86. Archbold 2021, Chapter 5A, *Sentences & Orders on Conviction (Sentencing Code)*, 5ASC-41. [↑](#footnote-ref-86)
87. *Lau Tak-ming & Anor*, at 386F; *Abdallah*, at [32]; *HKSAR v Chau Hon Kwong* [2011] 1 HKLRD 630, at [33]. [↑](#footnote-ref-87)
88. *Abdallah*, at [32]. [↑](#footnote-ref-88)
89. *HKSAR v Yim Hung-lui, Ricky* (Unrep., CACC 266/2011, 13 February 2012). [↑](#footnote-ref-89)
90. *HKSAR v Lam Kam-kwong* [2002] 1 HKC 541, at [8]; *Abdallah*, at [32]; *HKSAR v Ng Hon Keung* [2012] 1 HKLRD 1017, at [15]. [↑](#footnote-ref-90)
91. *Smit Hector Edward*, at [26]. [↑](#footnote-ref-91)
92. *Abdallah*, at [32]. [↑](#footnote-ref-92)
93. *HKSAR v Wong Suet Hau and Another* [2002] 1 HKLRD 69, at [34]. [↑](#footnote-ref-93)
94. *HKSAR v Wong Chi-ming* (Unrep., CACC 206/1998, 25 August 1998) at [6]. [↑](#footnote-ref-94)
95. *HKSAR v Leung Shuk-man* (Unrep., CACC 230/2001, 7 March 2002), at [9]. [↑](#footnote-ref-95)
96. *HKSAR v Tang Kai-hi* (Unrep., CACC 531/1999, 12 January 2000). [↑](#footnote-ref-96)
97. *HKSAR v Yan Wai Ming* (Unrep., CACC 417/2002, 26 February 2003), at [12]. [↑](#footnote-ref-97)
98. *Islam Azharul*, at [20]. [↑](#footnote-ref-98)
99. *HKSAR v Ali Qasim* (Unrep., CACC 332/2018, 14 January 2020). [↑](#footnote-ref-99)
100. *HKSAR v Islam Shafiqul* (Unrep., CACC 210/2019, 28 October 2020). [↑](#footnote-ref-100)
101. *Zhang*, at [103]. [↑](#footnote-ref-101)
102. *Ibid.*, at [104]. [↑](#footnote-ref-102)
103. For example, *香港特別行政區 訴 歐陽梧* (*Au Yeung Ng*) (Unrep., CACC 153/2008, 20 **‍**June **‍**2008); *HKSAR v CKS* (Unrep., CACC 472/2010, 13 January 2012); *HKSAR v Hu Hongda* (Unrep., CACC 387/2015, 13 May 2016); *HKSAR v Eugene Williams* (Unrep., CACC 230/2018, 21 **‍**May 2019); *HKSAR v Wong Chi-ying* (Unrep., CACC 320/2018, 31 May 2019); *HKSAR v Butt* ***‍****Muhammad Gulzar* (Unrep., CACC 205/2019, 17 July 2020); *HKSAR v Chung Ho-yin* (CACC **‍**75/2020, to be determined on 2 February 2021). [↑](#footnote-ref-103)
104. See *HKSAR v Chai Man-fong* (Unrep., Crim App No 433 of 1997, 20 October 1998); *香****‍****港****‍****特****‍****別****‍****行****‍****政區 訴 李嘉蔚 (Lee Ka Wai)* (Unrep., CACC 182/2012, 10 January 2014); *HKSAR* ***‍****v Nkwo Nanaemeka Darlington* [2016] 1 HKLRD 692, at [31]; *HKSAR v Ubah Joel Chidiebere* [2017] 4 HKLRD 263, at [30]. [↑](#footnote-ref-104)
105. *香港特別行政區 訴 梁致嘉* (Unrep., CACC 21/2012, 16 August 2012); *香港特別行政區 訴* ***‍****李嘉蔚 (Lee Ka Wai)* (Unrep., CACC 182/2012, 10 January 2014); *HKSAR* ***‍****v* ***‍****Shoki* ***‍****Fatuma* ***‍****Ramadhani* [2015] 2 HKLRD 696; *HKSAR v Rawe Waikama Magarya*; *HKSAR* ***‍****v* ***‍****Ngoma Juma Shabani*; *HKSAR v* *Nkwo Nanaemeka Darlington*; *HKSAR* ***‍****v* ***‍****Ifeanyichukwu* ***‍****Henry* ***‍****Onyeka* (Unrep., CACC 55/2016, 27 October 2016); *HKSAR* ***‍****v* ***‍****Okorie* ***‍****Nwabueze Joseph* (Unrep., **‍**CACC 194/2016, 11 January 2017); *HKSAR* ***‍****v* ***‍****Otieno* ***‍****Millicent* ***‍****Akoth* (Unrep., CACC 317/2016, 29 **‍**May 2017); *Ubah* ***‍****Joel ‍Chidiebere; HKSAR* ***‍****v Echendu Chijioke Nick* (Unrep., CACC 372/2016, 14 **‍**August 2017); *HKSAR v Oketa* ***‍****Sunday Basil* (Unrep., CACC 18/2017, 4 September 2017); *香****‍****港****‍****特****‍****別****‍****行政區 訴 邵慧君 (Siu Wai Kwan Nicole)* (Unrep., CACC 441/2014, 3 November 2017)*; 香港特別行政區 訴 安****‍****傑****‍****威* (Unrep., ***‍***CACC ***‍***374/2017, 12 October 2018); *香****‍****港****‍****特****‍****別****‍****行****‍****政區 訴 湛岳霖* (Unrep., ***‍***CACC ***‍***293/2018, 12 ***‍***June 2020). [↑](#footnote-ref-105)
106. *HKSAR v Valencia* [2018] 3 HKC 308, at [28]. [↑](#footnote-ref-106)
107. *HKSAR v Chukwuleta Sunday Freedaline & Anor* (Unrep., CACC 62/2017, 2 July 2019), at [12]. The same reservation was repeated by McWalters JA in *HKSAR v Shakeel Ahmed* (Unrep., ***‍***CACC ***‍***61/2017, 6 September 2019), at [59]. [↑](#footnote-ref-107)
108. *Valencia*, at [25]. [↑](#footnote-ref-108)
109. At [25]. [↑](#footnote-ref-109)
110. At 314I-315A. [↑](#footnote-ref-110)
111. *Shoki Fatuma Ramadhani*, at [1]. [↑](#footnote-ref-111)
112. *HKSAR v Shoki Fatuma Ramadhani* (Unrep., FAMC No 34 of 2018; [2018] HKCFA 51, 12 ***‍***November 2018). [↑](#footnote-ref-112)
113. *R v Hayden* [1975] 1 WLR 852. [↑](#footnote-ref-113)
114. *Ibid.*, at 853G-854E. [↑](#footnote-ref-114)
115. *Ibid.*, at 854A-E. [↑](#footnote-ref-115)
116. *Ibid.*, at 854G-H. [↑](#footnote-ref-116)
117. *R v Thayne* [1970] 1 QB 141. [↑](#footnote-ref-117)
118. *Ibid.*, at 142H. [↑](#footnote-ref-118)
119. *HKSAR v Chan Yuen Yee Carrie* [2017] 3 HKLRD 431. [↑](#footnote-ref-119)
120. *Attorney-General v So Lo-kam* [1986] HKLR 564. [↑](#footnote-ref-120)
121. *Attorney-General v Chin Chack-wing* (1961) HKLR 479. [↑](#footnote-ref-121)
122. *Ibid.*, at [490]. [↑](#footnote-ref-122)
123. *Customs and Excise Commissioners v Menocal* [1980] AC 598. [↑](#footnote-ref-123)
124. *Ibid.*, at 607C-F. [↑](#footnote-ref-124)
125. *Menocal*, at 606H-607B and 610A-C. [↑](#footnote-ref-125)
126. Para 94 *supra*. [↑](#footnote-ref-126)
127. *HKSAR v Ngoma Juma Shabani* [2015] 5 HKLRD 57. [↑](#footnote-ref-127)
128. AB, p 41F. [↑](#footnote-ref-128)
129. AB, p 41M. [↑](#footnote-ref-129)
130. *Shoki Fatuma Ramadhani*, *per* McWalters JA, at [54]-[55]. [↑](#footnote-ref-130)
131. *Ngoma Juma Shabani*, *per* McWalters JA, at [67]. [↑](#footnote-ref-131)
132. *Ibid.*, *per* Lunn VP, at [11-13]; *per* Macrae JA, at [23-27]. [↑](#footnote-ref-132)
133. AB, p 41T-U. [↑](#footnote-ref-133)
134. AB, p 41Q-R. [↑](#footnote-ref-134)
135. AB, pp 28C-32E. [↑](#footnote-ref-135)
136. AB, pp 40S-41B. [↑](#footnote-ref-136)
137. AB, p 41C-G. [↑](#footnote-ref-137)
138. AB, pp 41L-42A. [↑](#footnote-ref-138)
139. *Ngoma Juma Shabani*, *per* Macrae JA, at [33]. [↑](#footnote-ref-139)
140. *Ubah Joel Chidiebere*, at [94]. [↑](#footnote-ref-140)
141. *Ngoma Juma Shabani*, *per* Lunn VP, at [10-12]; *per* Macrae JA, at [28-34]. [↑](#footnote-ref-141)
142. Respondent’s written submissions, at para 160. [↑](#footnote-ref-142)
143. *HKSAR v Ifeanyichukwu Henry Onyeka* (Unrep., CACC 55/2016, 27 October 2016); *HKSAR v Okorie Nwabueze Joseph*; *HKSAR v Nwadiuto Samuel Joseph*; *HKSAR v Echendu* ***‍****Chijioke Nick*; and *HKSAR v Oketa Sunday Basil*. [↑](#footnote-ref-143)
144. *R v Osei (Gertrude)* (1988) 10 Cr App R (S) 289. [↑](#footnote-ref-144)
145. *Ibid.*, at 291. [↑](#footnote-ref-145)
146. *Ngoma Juma Shabani*, *per* Lunn VP, at [8]. [↑](#footnote-ref-146)
147. AB, p 41E-H; N-Q. [↑](#footnote-ref-147)
148. AB, p 41T-U. [↑](#footnote-ref-148)
149. See *Shoki Fatuma Ramadhani* (Appeal Committee determination), at footnote 2. [↑](#footnote-ref-149)
150. At the forfeiture hearing, some three weeks after her sentence, the appellant gave a different version in cross-examination, to the effect that, although she had been given 88 packets of dangerous drugs to swallow, she never in fact swallowed 82 of them but threw them away instead: AB, p 36G-I. [↑](#footnote-ref-150)
151. *Kilima*, *per* Macrae VP, at [91]-[92]. [↑](#footnote-ref-151)
152. *Ibid.*, at [91]. [↑](#footnote-ref-152)